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The Right of Refusal: Immigration Enforcement and the New Cooperative Federalism

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INTRODUCTION

In recent years, immigration enforcement has provoked conflicts among almost every level and branch of American government. Some disputes are horizontal: between the President and Congress, governors and state legislatures, sheriffs and boards of supervisors. Others are vertical: between states and federal agencies, the President and governors, states and localities. Many of the constitutional questions posed by these conflicts have entered the courts and spawned large academic literatures. But at least one has not: federal power to enlist state and local aid.

Attempts to secure such aid—which I will call "inducement strategies"—are a pervasive feature of modern federalism. They take many forms, ranging from simple solicitation, to financial incentives, to outright mandates. In one form or another, they show up whenever the federal government lacks the resources, or the political buy-in, to enforce a large regulatory program on its own. Sites of federal creativity and local resistance, these interactions are where broader visions of federal-state relations—partnership, hierarchy, bargaining, competition—play out on the ground. Inducement strategies are testing constitutional limits in areas as diverse as climate change,[1] health care,[2] and marijuana

1. *See* Order, West Virginia v. EPA, 136 S. Ct. 1000 (2016) (No. 15A773) (staying EPA coal regulations pending resolution of, among others, a Tenth Amendment coercion challenge); Brief of Petitioners at 78–86, West Virginia v. EPA, No. 15-1363 (D.C. Cir. Feb. 19, 2016) (asserting commandeering and coercion challenges).

enforcement.[3] But in immigration law, they have generated some particularly intense conflicts.

In 2015, the concept of a "sanctuary city"—one whose police and sheriffs do not help enforce immigration law—burst into the national immigration debate. In the preceding decade, a vast new interior enforcement system had come to heavily rely on state and local police to identify and arrest deportable noncitizens. Objecting to the attendant financial burdens and harm to police work, a number of cities, counties, and states began to resist. By the summer of 2014, hundreds of jurisdictions were refusing to cooperate, and later that year, federal officials were forced to revisit their own policies.[4]

This tension came to the fore in July of 2015, after an unauthorized immigrant shot and killed a woman on a pier in San Francisco. The shooter had been convicted of several immigration and drug crimes, and after being transferred to San Francisco on an old warrant, he had been released pursuant to a local non-cooperation policy.[5] A national furor erupted. Presidential candidates began calling for a "crack down" on cities like San Francisco.[6] A host of politicians began proposing legislation to punish cities and states that refused to cooperate.[7] The issue remained in the foreground throughout the 2016 presidential campaign.[8] Forcing local cooperation is now one of the main planks in the in-

2. *See* Bridget A. Fahey, *Health Care Exchanges and the Disaggregation of States in the Implementation of the Affordable Care Act*, 125 YALE L.J. F. 56 (2015), http://www.yalelawjournal.org/pdf/Fahey_PDF_zhtyvuqa.pdf [http://perma.cc/NVB6-SHL2].

3. *See* David S. Schwartz, *High Federalism: Marijuana Legalization and the Limits of Federal Power To Regulate States*, 35 CARDOZO L. REV. 567 (2013).

4. *See infra* Section I.A.3.

5. *See* Julia Preston, *San Francisco Murder Case Exposes Lapses in Immigration Enforcement*, N.Y. TIMES (July 7, 2015), http://www.nytimes.com/2015/07/08/us/san-francisco-murder-case-exposes-lapses-in-immigration-enforcement.html [http://perma.cc/R9JQ-GLTP].

6. *See* Editorial, *The Great "Sanctuary City" Slander*, N.Y. TIMES (Oct. 17, 2015), http://www.nytimes.com/2015/10/17/opinion/the-great-sanctuary-city-slander.html [http://perma.cc/E42A-KYW3]; Elise Foley, *Hillary Clinton Piles on San Francisco Officials, Putting Sanctuary Cities Under Even More Heat*, HUFFINGTON POST (July 7, 2015, 10:04 PM), http://www.huffingtonpost.com/2015/07/07/sanctuary-cities_n_7749406.html [http://perma.cc/GGF6-RVCJ].

7. *E.g.*, Ted Barrett, *Senate Set To Vote on Sanctuary City Bill*, CNN (Oct. 20, 2015, 9:15 AM), http://www.cnn.com/2015/10/20/politics/sanctuary-cities-capitol-hill-vote/ [http://perma.cc/E4ER-54FJ]; Foley, *supra* note 6; Cristina Marcos, *House Votes To Punish Sanctuary Cities*, HILL (July 23, 2015, 4:21 PM), http://thehill.com/blogs/floor-action/house/249003-house-votes-to-punish-sanctuary-cities [http://perma.cc/Y8U2-AEBB].

8. *See, e.g.*, Theodore Schleifer, *South Carolina Television Stations Pull Anti-Rubio Ad Amid Legal Concerns*, CNN (Feb. 15, 2016, 9:21 PM), http://www.cnn.com/2016/02/15/politics/cruz-super-pac-anti-rubio-south-carolina-ad/ [http://perma.cc/E2K8-R6GF].

coming administration's immigration platform.[9] A lurking question has thus come to the surface: how far can the federal government go to demand state and local support?

The question comes at a time of uncertainty in the law of cooperative federalism.[10] In *National Federation of Independent Business v. Sebelius* (*NFIB*), the Supreme Court struck down a spending condition as unconstitutionally coercive for the first time in history.[11] In doing so, it reopened some federalism questions that date back to the 1980s and 1990s, when the Court established that Congress could regulate state entities alongside private ones, but could not commandeer states' regulatory services. In the wake of *NFIB*, scholars, courts, and lawyers must grapple with some new questions. How do coercion and commandeering fit together? Does *NFIB* tell us anything deeper about the nature of American federalism?

Immigration law provides especially fertile ground for thinking about those questions because of how deeply the federal government now relies on state assistance. Our immigration system delegates a large portion of immigrant screening to back-end enforcement,[12] one of whose primary criteria is criminality.[13] But the federal government lacks the physical resources and constitutional authority to widely access that criterion—only states can enforce general criminal law. As a result, interior enforcement now functions largely as an adjunct to state criminal justice systems. In perhaps no other realm of federal policy does enforcement so depend on state and local aid.[14]

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9. *See* Amita Kelly & Barbara Sprunt, *Here Is What Donald Trump Wants To Do in His First 100 Days*, NPR (Nov. 9, 2016, 3:45 PM), http://www.npr.org/2016/11/09/501451368/here-is-what-donald-trump-wants-to-do-in-his-first-100-days [http://perma.cc/C2C7-WREF] ("[O]n the first day, I will . . . cancel all federal funding to Sanctuary Cities.").

10. By "cooperative federalism," I mean the joint administration of federal regulatory programs, whether they involve state entities disbursing federal funds, federal and state regulators developing joint regulatory standards, or collaborative enforcement of the sort that happens in immigration law. I use the term very generally to describe any federal-state or federal-local regulatory interaction.

11. 132 S. Ct. 2566 (2012). The provision conditioned states' existing Medicaid funds on their agreeing to participate in the Affordable Care Act's Medicaid expansion.

12. *See generally* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809 (2007) (describing the "second-order" nature of immigrant screening).

13. *See generally* Allegra M. McLeod, *The U.S. Criminal-Immigration Convergence and Its Possible Undoing*, 49 AM. CRIM. L. REV. 105 (2012) (exploring possible reasons why).

14. *See* Christopher N. Lasch, *Enforcing the Limits of the Executive's Authority To Issue Immigration Detainers*, 35 WM. MITCHELL L. REV. 164, 174–76 (2008); Peter H. Schuck, *Taking Immigration Federalism Seriously*, 2007 U. CHI. LEGAL F. 57, 71–77 ("[W]here enforcement against criminal aliens is concerned . . . federal immigra-

To maintain that link, different federal actors have used or proposed a number of boundary-pushing inducement strategies. The approaches vary widely in the amount of pressure they apply. Some involve simple solicitation of aid, or unilateral offers of resources and authority. Others trade federal funds and services for local assistance. Harsher proposals involve threats to punish resistance by cutting off pre-existing federal grants. Several even ban certain forms of refusal outright, or mandate certain forms of participation. These different forms of pressure share a common tendency to locate enforcement decisions in increasingly lower levels of the state criminal-justice hierarchy. But they imply widely divergent visions of federal-state relations.

They also fit uneasily into federalism's existing doctrine and theory. The Supreme Court in *NFIB* updated its inducement jurisprudence to prohibit certain spending threats; as Part II argues, its cooperative federalism cases now cohere around what I call a "right of refusal," a narrow but absolute right against certain forms of inducement. But the Court—and, for the most part, the lower courts—have had little occasion to grapple with many of the strategies being tested in the immigration sphere. Those strategies include mandates to share information, prohibitions against non-cooperation policies, and funding threats directed at local actors. As I explain in Part III, each of these strategies is in some tension with the Court's emerging federalism jurisprudence.

These unique forms of integration similarly cut across existing scholarly accounts of how our federal system functions, or should function. They shed new empirical light on old debates about how to promote local autonomy and strengthen political accountability. They also show how federalism can protect individual liberty and encourage a robust national debate. In other words, immigration is on the front lines of today's federalism, whose law and theory must now account for it. The converse is also true. The structure of immigration policy is now very sensitive to the changing norms of cooperative federalism. The coevolution of immigration and federalism promises to profoundly shape both.

Despite this rich terrain, scholars of immigration federalism have largely focused on other constitutional questions. A vast literature has explored questions of state power and preemption.[15] This tracks the federalism controversies that have generated the most litigation in the last decade, such as Arizona's S.B. 1070 and similar laws. After the 2016 presidential election, however, questions of federal inducement power loom on the horizon.[16] And while earlier scholarship

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tion officials are practically impotent without the substantial help of the state and local criminal justice systems.").

15. *See, e.g.*, Ming H. Chen, *Immigration and Cooperative Federalism: Toward a Doctrinal Framework*, 85 U. COLO. L. REV. 1087 (2014); Pratheepan Gulasekaram & Karthik Ramakrishnan, *Immigration Federalism: A Reappraisal*, 88 N.Y.U. L. REV. 2074 (2013); Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power over Immigration*, 86 N.C. L. REV. 1557 (2008).

16. Around 400 subfederal jurisdictions currently have non-cooperation policies. *See* Jasmine C. Lee, Rudy Omri & Julia Preston, *What Are Sanctuary Cities?*, N.Y.

has examined the question of whether state and local police should choose to participate,[17] none has subjected the range of federal inducement practices to sustained doctrinal and theoretical scrutiny.[18]

Scholars of federalism, meanwhile, have largely treated immigration as a footnote. As they have identified new modes of integration and begun to reconcile them with the Court's federalism jurisprudence,[19] few have looked closely at

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TIMES (Sept. 3, 2016), http://www.nytimes.com/interactive/2016/09/02/us/sanctuary-cities.html [http://perma.cc/7SUH-FXMW]. The new administration has promised to make local enforcement a core feature of its immigration policy. *See* Kelly & Sprunt, *supra* note 9. At the same time, a growing number of mayors have announced their intention to resist federal efforts to enlist their police. *See* Alex Dobuzinskis & Joseph Ax, *Mayors of NY and Los Angeles Pledge To Remain Immigrant Sanctuaries*, REUTERS (Nov. 10, 2016, 9:12 PM), http://www.reuters.com/article/us-usa-immigration-sanctuarycities-idUSKBN13604P [http://perma.cc/2YM6-7P48].

17. *See, e.g.*, Bill Ong Hing, *Immigration Sanctuary Policies: Constitutional and Representative of Good Policing and Good Public Policy*, 2 U.C. IRVINE L. REV. 247 (2012) (arguing against local participation); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police To Make Immigration Arrests*, 69 ALB. L. REV. 179 (2005) (arguing for local participation); Michael J. Wishnie, *State and Local Police Enforcement of Immigration Laws*, 6 U. PA. J. CONST. L. 1084 (2004) (arguing against local participation). In this Article, I mostly avoid this terrain. Instead, my concern is for the rules and modes of interaction that will determine who can act on their policy preferences.

18. Many of the interactions I explore in Sections I.B and I.C—including notification mandates, local funding threats, and intrastate inducement dynamics—have received extremely limited academic attention. To be sure, scholars have examined many federal-local interactions individually. *See* Christine N. Cimini, *Hands Off Our Fingerprints: State, Local, and Individual Defiance of Federal Immigration Enforcement*, 47 CONN. L. REV. 101 (2014) (fingerprint sharing under Secure Communities); Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Policies & Immigration Federalism: A Dialectic Analysis*, 55 WAYNE L. REV. 1683 (2009) (discussing 8 U.S.C. § 1373 (2012)); Orde F. Kittrie, *Federalism, Deportations, and Crime Victims Afraid To Call the Police*, 91 IOWA L. REV. 1449 (2006) (same); Christopher N. Lasch, *Federal Immigration Detainers After* Arizona v. United States, 46 LOY. L. REV. 629 (2012) (analyzing the legality of immigration detainers); Huyen Pham, *The Constitutional Right Not To Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006) (same). Others have examined attempts to enlist local aid through more specific lenses, like privacy. *See* Anil Kalhan, *Immigration Policing and Federalism Through the Lens of Technology, Surveillance, and Privacy*, 74 OHIO ST. L.J. 1106 (2013); Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137 (2008). Many of these studies pre-date *NFIB*. None have sought to identify the full range of inducement interactions, assess their constitutional dimensions, or situate them within the broader federalism literature.

19. *See, e.g.*, Jessica Bulman-Pozen, *Executive Federalism Comes to America*, 102 VA. L. REV. 953 (2016); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Bridget A. Fahey, *Consent Procedures and American*

the encounters taking place in the immigration realm.[20] Perhaps this has stemmed from a perception that immigration is different, a self-contained area of law whose rules and patterns cannot be generalized. That may be true of some federalism questions, such as state authority to regulate migration, which is uniquely constrained.[21] But the Supreme Court has given no indications that procedural constraints on federal power—commandeering, state sovereign immunity, coercion, spending conditions, and the like—vary from one area of substantive law to the next. Immigration therefore presents the opportunity to test federalism doctrine and theory where federal-state integration is tightest.

This Article begins that project. Its goals are three-fold: to document and categorize the inducement interactions taking place in immigration law; to measure them against the evolving constitutional rules that govern federal-state interaction; and to ask what they portend for the practice of immigration enforcement and the study of federalism going forward.

To set the scene for this discussion, Part I explores immigration law's history of integration, resistance, and inducement. It presents a taxonomy of inducements and examines their collective tendency to put downward pressure on state enforcement discretion—from state actors to local ones, and from policymakers to employees.

Part II identifies the constitutional rules that govern federal attempts to secure state participation. I argue that, in *NFIB*, the Supreme Court assimilated the commandeering and coercion doctrines into a broader principle—the

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Federalism, 128 HARV. L. REV. 1561 (2015); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996 (2014); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

20. The same is true of the literature on "administrative federalism," which has largely ignored the joint administration of immigration law. *See, e.g.*, Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023 (2008); Miriam Seifter, *Federalism at Step Zero*, 83 FORDHAM L. REV. 633 (2014).

There are some exceptions. *See, e.g.*, Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094 (2014) (using immigration policy as a prominent part of the argument that federalism serves as a framework for airing competing views and ultimately forging national consensus); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 34–35 (2011) (using one federal-local immigration interaction—the 287(g) program—as an example of "negotiated federalism"); *see also infra* Section I.A.2 (explaining the 287(g) program).

21. *See* Arizona v. United States, 132 S. Ct. 2492 (2012); Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 603 (2013) (arguing that in immigration preemption cases, "[i]t is as if a very heavy thumb has been placed on the federal government's side of the scale"); Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 33 (describing *Arizona*'s analysis as "a radical departure from conventional approaches to preemption").

"right of refusal"—which is narrow in scope but flexible in reach. It prevents the federal government from using inducement strategies—even those that do not technically commandeer or condition funds—whose intent or effect is to deny states and localities the ability to withhold their regulatory assistance. It otherwise leaves intact federal authority to regulate subfederal governments directly, or to offer incentives to encourage participation. This larger principle brings greater coherence to the case law and generates predictions about the future path of the doctrine.

With the immigration and federalism terrains thus mapped, the rest of the Article puts them together. Part III considers the legality of the most forceful inducement approaches, and argues that some of them are in serious tension with the right of refusal. Part IV shifts to theoretical territory, asking how recent experience intersects with some of the normative claims in the wider federalism literature. This Part shows how immigration law provides fresh insights into perennial questions about state autonomy, inter-systemic debate, rights protection, and accountability. Finally, Part V concludes by meditating on the intertwined futures of immigration enforcement and cooperative federalism.

I. Inducement Strategies in Immigration Enforcement

The federal government uses inducement strategies in the context of concrete policy programs. This Part charts the emergence of federal-state integration as a central feature of interior immigration enforcement. It then presents a taxonomy of inducement strategies and distills their deeper dynamics. Those dynamics are the raw material for the doctrinal and theoretical discussions that follow.

A. Integration in Immigration Enforcement

Our immigration enforcement system has undergone profound changes in the last three decades.[22] Three overlapping stories are most relevant to the present federalism landscape: first, the birth and expansion of interior enforcement; second, the emergence of criminality as the main criterion of interior en-

22. Others have covered similar ground. *See, e.g.*, Jennifer M. Chacón, *Overcriminalizing Immigration*, 102 J. Crim. L. & Criminology 613, 630–47 (2012) (detailing the expansion of immigration enforcement over the last several decades); Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, Migration Pol'y Inst. (Jan. 2013), http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf [http://perma.cc/M8RG-G3LM] (same). My aim, in this Part, is more specific—to tease out the particular phenomenon of federal reliance on, and resulting pursuit of, state aid. That means highlighting some facets over others: interior over border; criminal law as a tool, not a model, for immigration enforcement; federal attempts to encourage local participation, not reign it in.

forcement; and third, an increasing focus on (and opposition to) using subfederal resources and authority to access that criterion.[23]

1. The Birth of the Modern System

In the early 1980s, immigration enforcement was a smaller and less formal project than it is today. The entire Immigration and Naturalization Service (INS) employed fewer than twelve thousand people and operated on an annual budget well below $1 billion (three decades later, those numbers are around ninety thousand and $18 billion, respectively).[24] Most deportations consisted of informal "returns,"[25] which carried few legal consequences. Border agents openly allowed seasonal flows of migrant workers, who came from Mexico to work in agriculture and then returned home.[26]

The number of unauthorized immigrants living in the United States reached 3.2 million in 1986,[27] as waves of refugees fled brutal civil wars in Nicaragua, Guatemala, and El Salvador. Their reception was complicated by the Reagan Administration's support for the governments of Guatemala and El Salvador, which many of the refugees were fleeing. In their INS proceedings, the

23. Limited federal-local collaboration existed before the 1980s, but it was "local and ad hoc," whereas today it is "national, automated, and comprehensive." Rachel E. Rosenbloom, *Policing Sex, Policing Immigrants: What Crimmigration's Past Can Tell Us About Its Present and Its Future*, 104 CALIF. L. REV. 149, 197 (2016).

24. Meissner et al., *supra* note 22, at 16; Justice Mgmt. Div., *Immigration and Naturalization Service: Authorized Positions 1975–2003*, U.S. DEP'T JUST. 104–05 (Spring 2002), http://www.justice.gov/archive/jmd/1975_2002/2002/pdf/page104-108.pdf [http://perma.cc/E937-F3RN]; *FY 2013 Budget in Brief*, U.S. DEP'T HOMELAND SEC. 81, 91, 155 (2013), http://www.dhs.gov/xlibrary/assets/mgmt/dhs-budget-in-brief-fy2013.pdf [http://perma.cc/L6UR-W99Y] (reporting 61,160 CBP employees, 20,265 ICE employees, and 10,700 CIS employees in fiscal year 2013).

25. Office of Immigration Statistics, *2013 Yearbook of Immigration Statistics*, U.S. DEP'T HOMELAND SEC. 103 tbl.39 (Aug. 2014), http://www.dhs.gov/sites/default/files/publications/ois_yb_2013_0.pdf [http://perma.cc/NTL8-UPRR]. For instance, in 1986, there were 1,586,320 returns and 24,592 removals—a ratio of sixty-five to one.

26. *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL33874, UNAUTHORIZED ALIENS RESIDING IN THE UNITED STATES: ESTIMATES SINCE 1986, at 3 fig.1 (2012), http://www.fas.org/sgp/crs/misc/RL33874.pdf [http://perma.cc/J82E-QXH6] (describing "a rather fluid movement of migratory workers along the southern border," which was later "stymied" by tightened enforcement).

27. *Id.*

State Department would often weigh in against granting asylum.[28] As a result, many migrants from those countries did not have a path to legal status.[29]

Objecting to this state of affairs, churches and other private groups began declaring themselves "sanctuaries" and offering shelter, medical care, bond, and legal services to undocumented migrants.[30] Local governments joined the movement too, adopting sanctuary policies that declared opposition to federal refugee policy and prohibited discrimination by city employees against Guatemalans and Salvadorans.[31] Other sanctuary provisions were more operational. They prohibited city employees—most significantly, the police—from taking a number of immigration-related actions, such as inquiring into status, arresting based on civil violations, and reporting those without status to the federal government.[32] These were the first generation of local non-cooperation policies. In all, about two dozen cities and four states adopted some sort of sanctuary policy in the 1980s.[33]

In 1986, after years of negotiation, Congress reached a compromise to address the undocumented population then living in the United States. The Immigration Reform and Control Act (IRCA) offered one-time legalization to about half of this population.[34] In exchange, it enacted the first ban against employing undocumented immigrants, which remains in effect today.[35] Its theory was that fewer migrants would come to the United States if they could not work. This was the federal government's first widespread interior enforcement

28. Pablo Lastra, *Who Counts as a Refugee in US Immigration Policy—and Who Doesn't*, NATION (Aug. 11, 2014), http://www.thenation.com/article/who-counts-refugee-us-immigration-policy-and-who-doesnt/ [http://perma.cc/UJA2-JKHT].

29. Asylum approval rates for Salvadorans and Guatemalans were below three percent in 1984. *See* Susan Gzesh, *Central Americans and Asylum Policy in the Reagan Era*, MIGRATION POL'Y INST. (Apr. 1, 2006), http://www.migrationpolicy.org/article/central-americans-and-asylum-policy-reagan-era [http://perma.cc/9XZS-8HYM]. Eventually the courts started requiring immigration judges to take a second look. *See* Am. Baptist Churches v. Thornburgh, 760 F. Supp. 796 (N.D. Cal. 1991).

30. *See* Pham, *supra* note 18, at 1382–83.

31. *See* Hing, *supra* note 17, at 253 (describing a "genre of policies that can be classified as expressions of 'solidarity' with the Sanctuary Movement of the 1980s").

32. Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LA RAZA L.J. 50, 51–54 (1994).

33. *See* Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 311–16 (1989); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 600–05 (2008);

34. Pub. L. No. 99-603, 100 Stat. 3359 (1986).

35. *See* 8 U.S.C. § 1324a (2012). Employers who violate the ban are subject to civil fines and criminal penalties. *See id.* § 1324a(f). The work prohibition has never been robustly enforced. Meissner et al., *supra* note 22, at 76–77.

initiative. IRCA thus introduced the model for modern statutes addressed to unauthorized migration: trading relief for enforcement.[36]

IRCA also directed the enforcement bureaucracy to shift more attention to immigrants with criminal records—an instruction that necessarily contemplates interior enforcement.[37] In response, the INS created two programs to identify deportable immigrants in state custody and initiate deportation proceedings during their sentences.[38] These policies were the precursors for the modern federal-local enforcement architecture. That same year, Congress created a new category of crime called "aggravated felonies"—which initially included only drugs and weapons trafficking and murder—and directed the INS to focus its efforts on immigrants convicted of those crimes.[39] Two years later, Congress expanded the list of aggravated felonies, and issued instructions for the INS to prepare a "criminal alien census" and a "plan for the prompt removal from the United States of criminal aliens."[40]

2. Expansion and Convergence

Our enforcement system underwent tectonic changes in the two decades after IRCA. This is when most of the current undocumented population arrived in the United States.[41] It is also when the antecedents for the modern system were put in place: extensive funding for interior enforcement, widespread use of

36. Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 201–03 (describing the political trade of legalization for employer sanctions). Efforts at comprehensive reform in 2007 and 2013 employed the same structure. *See, e.g.*, Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013); Comprehensive Immigration Reform Act, S. 1348, 110th Cong. (2007).

37. *See* Immigration Reform and Control Act, Pub. L. No. 99-603, § 701, 100 Stat. 3359, 3445 (1986); *see also* MARC R. ROSENBLUM, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 11–12 (2012), http://fas.org/sgp/crs/homesec/R42057.pdf [http://perma.cc/5RJC-CSUL].

38. *See* ROSENBLUM, *supra* note 37, at 12 & n.42; LISA M. SEGHETTI, STEPHEN R. VIÑA & KARMA ESTER, CONG. RESEARCH SERV., RL 32270, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 3 (2009), http://www.au.af.mil/au/awc/awcgate/crs/rl32270.pdf [http://perma.cc/22BT-VVNR].

39. Anti-Drug Abuse Act, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469–70 (1988).

40. Immigration Act, Pub. L. No. 101-649, §§ 501, 510, 104 Stat. 4978, 5048, 5051–52 (1990).

41. Eighty-two percent of the undocumented population as of January 2012 entered the country after 1990. Sixty-nine percent entered between 1990 and 2004. *See* Bryan Baker & Nancy Rytina, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2012*, U.S. DEP'T HOMELAND SEC. 3 tbl.1 (Mar. 2013), http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2012_2.pdf [http://perma.cc/77CT-L4DW].

detention and criminal sanctions, and a variety of mechanisms to encourage local participation.

Two statutes in the mid-1990s extended IRCA's nod toward integrating criminal and immigration enforcement. The Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA) created the State Criminal Alien Assistance Program (SCAAP), which reimburses states and localities for a small portion of the cost of detaining non-citizens.[42] By tying reimbursement to immigration status, SCAAP encourages jails and prisons to collect inmates' citizenship and status information. That same year, the INS created the Law Enforcement Support Center (LESC), a 24-hour hotline for local police to check arrestees' immigration records.[43]

In 1996, Congress dramatically intensified the enforcement system. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), along with other statutes enacted the same year, streamlined and hardened many aspects of the deportation process.[44] Four features are most relevant to current federal-state integration.

First, IIRIRA expanded the conviction-based grounds for deportation, enlarged the definition of aggravated felonies, and cut off some avenues for deportation relief.[45] Together, these changes meant that a larger set of people could now be deported from the interior. It also expanded the mandate of the INS programs that worked with states and leveraged arrests and convictions.[46]

Second, the statute introduced new procedures—expedited removal, reinstatement of removal, and administrative removal[47]—to accelerate formal de-

42. Pub. L. No. 103-322, 108 Stat. 1796 (codified at 8 U.S.C. § 1231(i) (2012)).

43. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/AIMD-95-147, LAW ENFORCEMENT SUPPORT CENTER: NAME-BASED SYSTEMS LIMIT ABILITY TO IDENTITY ARRESTED ALIENS 4 (1995), http://www.gao.gov/archive/1995/ai95147.pdf [http://perma.cc/HZ6D-9DYX].

44. Illegal Immigration and Immigrant Responsibility Act, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified at 8 U.S.C. §§ 1101 *et seq.*, 1221 *et seq.*, 1324, 1363(a)). *See generally* Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936 (2000) (describing the range of reforms).

45. Other statutes that expanded the list of aggravated felonies include the Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 3009 (1996) and the Immigration and Nationality Technical Correction Act, Pub. L. No. 103-416, 108 Stat. 4305 (1994).

45. *See* 8 U.S.C. § 1225.

46. ROSENBLUM, *supra* note 37, at 12.

47. *See* 8 U.S.C. § 1225 (expedited removal); *id.* § 1231(a) (reinstatement); *id.* § 1228 (administrative removal). While expedited removal primarily takes place at the border, it can be (and has been) extended inland in certain circumstances. *See* STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 807 (5th ed. 2009).

portations. This helped facilitate the rise of interior enforcement by making it cheaper and faster.

Third, IIRIRA introduced a system of mandatory detention; immigrants convicted of aggravated felonies now had to be detained during their removal proceedings.[48] This spurred the agency to build and contract for more detention space, which gave agents a place to take the people they picked up from local jails.

Fourth, the statute adopted two new approaches to securing local participation. One was the "287(g) program," under which local law enforcement agencies could directly enforce the civil immigration laws under the supervision of federal officials.[49] While IIRIRA authorized the program, the INS would not begin to implement it until 2002.[50] The other approach was a provision, 8 U.S.C. § 1373, aimed at preventing local resistance by preempting certain sanctuary policies—those that restricted the sharing of immigration-status information with federal officials.[51] These programs were designed to translate criminal-law arrests and incarceration into immigration enforcement action.

48. *See* 8 U.S.C. § 1226(c).

49. *Id.* § 1357(g). The INS did not begin using this authority until 2002. *See* Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POL'Y INST. 9 (Jan. 2011), http://www.migrationpolicy.org/sites/default/files/publications/287g-divergence.pdf [http://perma.cc/5VEH-MSTU].

50. ROSENBLUM, *supra* note 37, at 16.

51. *See* 8 U.S.C. § 1373(a)–(b) ("[A] Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual."); *see also id.* § 1373(b) (imposing the same prohibition). The welfare reform statute contained a similar provision. *See id.* § 1644 (roughly the same). For simplicity's sake, I will refer to the two anti-sanctuary statutes together as "§ 1373."

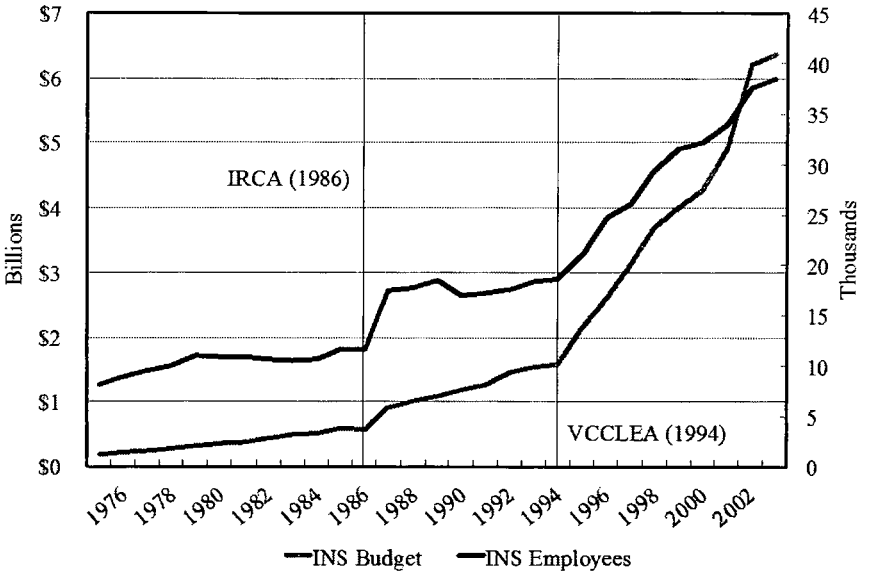

Figure 1: INS Employees and Budget

Along with IIRIRA came successive increases in funding and hiring at the INS. Its workforce nearly doubled over the course of the 1990s, and the budget nearly quadrupled.[52] With more resources came more enforcement. Both removals and returns increased precipitously during the first Bush and Clinton Administrations, though still mostly at the border. Over the course of the decade, returns doubled and removals shot up more than eight-fold.[53] The biggest expansions of interior enforcement, however, were still to come.

The 9/11 attacks changed immigration law profoundly. Mindful that the attackers were foreigners here on tourist visas, the federal government began to treat unauthorized immigration as a national security problem and not an economic issue.[54] In 2002, Congress transferred the INS's enforcement functions into the new Department of Homeland Security (DHS).[55] In addition, the Executive Branch began actively recruiting local police and sheriffs' departments into immigration enforcement.

This recruitment proceeded along multiple fronts. In 2002, the Office of Legal Counsel (OLC) released a memorandum concluding that states had inherent authority, as sovereigns, to make arrests for civil immigration violations,

52. *See* Justice Mgmt. Div., *supra* note 24, at 107.

53. *Id.*

54. *See* David A. Harris, *The War on Terror, Local Police, and Immigration Enforcement: A Curious Tale of Police Power in Post-9/11 America*, 38 RUTGERS L. REV. 1, 15 (2006) (noting the paradigm shift).

55. *See* Homeland Security Act, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

even without express federal authorization.[56] To facilitate those arrests, the FBI started including immigration status information in the federal database that local police check for outstanding warrants and prior convictions, the National Crime Information Center (NCIC).[57] This gave every law enforcement officer in the United States instant access to a person's immigration data.[58] To encourage them to use that tool, federal officials began personally soliciting local involvement.[59]

Some localities signed on. Inquiries to the LESC steadily increased. After six years of dormancy, DHS started signing up local law enforcement agencies for the 287(g) program in 2002.[60] By 2012, there were fifty-seven 287(g) agreements in effect, though today only thirty-two remain.[61]

Others resisted. A number of cities and states expanded old or adopted new non-cooperation policies, which either prohibited police from *asking* arrestees about immigration status, prevented them from *reporting* it to DHS, or both.[62] This was the second generation of non-cooperation policies. Unlike in the 1980s, when sanctuary policies generally stemmed from substantive disagreement with federal decisions—namely, the failure to protect certain Central American refugees—the sanctuary policies of the early 2000s responded to more procedural concerns. The primary reason cited by state and local governments was that immigrants, their families, and their communities would not cooperate with local police if they thought the police were a conduit to the de-

56. Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Att'y Gen. (Apr. 3, 2002), http://www.aclu.org/files/FilesPDFs/ACF27DA.pdf [http://perma.cc/T2CD-345E].

57. The Regulatory Plan, 67 Fed. Reg. 74,158, 74,159 (Dec. 9, 2002). *See generally National Crime Information Center*, FED. BUREAU INVESTIGATION, http://www.fbi.gov/services/cjis/ncic [http://perma.cc/7PJ5-YCSL].

58. *See* Kalhan, *supra* note 18, at 1162 (explaining the new use of the NCIC); Wishnie, *supra* note 17, at 1095–97 (same).

59. *See* Pham, *supra* note 18, at 1386 (describing solicitation); Wishnie, *supra* note 17, at 1087 (same).

60. ROSENBLUM, *supra* note 37, at 16. Most agreements were signed after 2006. *Id.* There are two kinds of 287(g) contracts: jail screening, in which local officials interrogate inmates and run their names through immigration databases; and task forces, in which local officers police for immigration violations alongside their normal criminal-law duties. *Id.* at 16–17 (describing both types).

61. The fifty-seven 287(g) agreements in 2012 included thirty-two for jail screening, seventeen for task force policing, and eight for both. *Id.* ICE has since canceled the task force agreements. *See Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/factsheets/287g [http://perma.cc/L8R2-MBB2].

62. Kittrie, *supra* note 18, at 1467–68 (listing policies); Pham, *supra* note 18, at 1387 (same). Professor Bill Ong Hing counted more than seventy jurisdictions with some sort of non-cooperation policy as of 2012, before the current wave of anti-detainer policies began. *See* Hing, *supra* note 17, at 248–49.

portation system.[63] The same reasoning applied to other government services as well. This resistance did not stem from disagreement with any particular enforcement outcomes, but from disagreement with using local police to achieve those outcomes.

Meanwhile, crime-based enforcement was rapidly expanding. The budget for the main interior enforcement sub-agency within DHS doubled from 2004 to 2008.[64] Its budget for programs connected to state criminal justice systems rose even faster, increasing by a factor of *twenty-seven* over a period of five years.[65] These increases meant that by 2008, funding was in place for widespread arrest- and conviction-based immigration enforcement. With more funding came more removals, which doubled from 189,026 in 2001 to 359,795 in 2008, the final year of the Bush Administration.[66]

The link between crimes and deportation was also tightening in other ways. DHS's detention resources—necessary for holding immigrants taken from state prisons and local jails—had spiked since IIRIRA introduced mandatory detention. In 2008, capacity was five times higher than in 1994.[67] Changes at the border also facilitated federal-state integration during this time. More people each year were being either formally removed or prosecuted for immigration crimes.[68] Formal removal keeps a person's name in immigration databases,

63. *See, e.g.*, *Enforcing Immigration Law: The Role of State, Tribal and Local Law Enforcement*, INT'L ASS'N CHIEFS POLICE 1 (2004), http://www.markwynn.com/trafficking/enforcing-immigration-law-the-role-of-state-tribal-and-local-le-2004.pdf [http://perma.cc/GD7Y-3JB7] (warning of "a chilling effect on both legal and illegal aliens reporting criminal activity or assisting police in criminal investigations"); *see also* Harris, *supra* note 54, at 33–37 (describing the range of resistance to federal entreaties); *id.* at 37 ("By far, the most frequent and impassioned objection that came from state and local police concerned their own effectiveness: becoming players in the enforcement of immigration law would be bad police work, plain and simple.").

64. *See* ROSENBLUM, *supra* note 37, at 24 (describing Enforcement and Removal Operations (ERO), within Immigration and Customs Enforcement (ICE)); *id.* at 24 tbl.5 (showing overall ERO budget of $959.7 million in FY 2004 and $2.4 billion in 2008). By fiscal year 2013, the ERO budget had reached $2.8 billion. *Id.*

65. *Id.* (FY 2004 = $23.4 million; FY 2005 = $69 million; FY 2006 = $199.9 million; FY 2008 = $641.1 million).

66. Office of Immigration Statistics, *supra* note 25, at 103.

67. Anil Kalhan, *Rethinking Immigration Detention*, 110 COLUM. L. REV. SIDEBAR 42, 44–45 & n.21 (2010). Detention spending increased too. ERO's budget for "custody operations" doubled from fiscal years 2005 to 2010. *See Immigration and Customs Enforcement (ICE) Budget Expenditures: FY 2005–FY 2010*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (2010), http://trac.syr.edu/immigration/reports/224/include/3.html [http://perma.cc/NE6G-Y3S2].

68. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., STREAMLINE: MEASURING ITS EFFECT ON ILLEGAL BORDER CROSSING 4–7 (2015), http://www.oig.dhs.gov/assets/Mgmt/2015/OIG_15-95_May15.pdf [http://perma.cc/5FED-3NLB] (describing the origin and expansion of Operation Streamline, which resulted in a

which marks them as deportable if they reenter and later come into contact with local police. More border prosecutions mean that more of the immigrants found in the interior will have criminal convictions, and thus fall within the conviction-based federal enforcement priorities that can trigger federal-local collaboration.

This criminal focus would soon sharpen even further. Shortly after 9/11, Congress had instructed federal law enforcement agencies to integrate their databases.[69] In 2007, Congress appropriated $200 million for the development of a new initiative to connect the FBI's biometric database with DHS's in order to identify removable non-citizens who came into contact with state and local police.[70] In the last few months of the Bush Administration, DHS began to move beyond the pilot phase. This program would weave together all the threads from the previous decade: a focus on the interior, integration with criminal law, and reliance on local police. In 2008, it was renamed Secure Communities.

3. The Present Federalism Impasse

Secure Communities was slowly rolled out over the next four years.[71] It is "the largest expansion of local involvement in immigration enforcement in the nation's history."[72] Anytime a person is booked by a law enforcement agency in the United States, their fingerprints are sent to the FBI.[73] Secure Communities links the FBI database to a DHS database of people who have come into contact with the immigration system.[74] The program thus allows DHS to screen every arrestee in the country for potential deportability.

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seven-fold increase in the criminal prosecution of unauthorized border crossers); *see also* 8 U.S.C. § 1326 (2012) (immigration crime of illegal reentry); *id.* § 1325 (crime of illegal entry).

69. *See* USA Patriot Act, Pub. L. No. 107-56 §§ 403, 413, 414, 115 Stat. 272 (2001).

70. Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, 121 Stat. 1844 (2007). A pilot program had started in late 2006.

71. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87, 99–100 (2013) (showing activation pattern from late 2009 to mid-2012). Counties are the relevant jurisdiction because, in most states, county sheriffs control the jails, where inmates are held before trial and on short sentences, even when city police are the ones who made the arrest.

72. *See id.* at 93 ("In short, Secure Communities is the largest expansion of local involvement in immigration enforcement in the nation's history.").

73. *See* Criminal Justice Info. Servs. Div., *Integrated Automated Fingerprint Identification System*, FED. BUREAU INVESTIGATION (2012), http://www.fbi.gov/file-repository/about-us-cjis-fingerprints_biometrics-biometric-center-of-excellences-iafis_0808_one-pager825 [http://perma.cc/HZJ5-3NP2].

74. *See* U.S. DEP'T OF HOMELAND SEC., PRIVACY IMPACT ASSESSMENT FOR THE AUTOMATED BIOMETRIC IDENTIFICATION SYSTEM 5 (Dec. 7, 2012), http://www.dhs.gov/sites/default/files/publications/privacy/PIAs/privacy_pia_usvisit_ident_appendixj_jan2013.pdf [http://perma.cc/7HZP-52PY] (describing the DHS database).

At first, DHS signed agreements with state officials before activating Secure Communities within their states.[75] Many states signed up, but others balked.[76] As resistance grew, on August 5, 2011, DHS announced that the program was actually mandatory, and that states could not back out.[77] It rescinded all the agreements that had been signed up to that point, explaining that they were no longer necessary.[78] Many state officials and advocacy groups protested this reversal,[79] but because Secure Communities simply sends fingerprints from one federal agency to another, local police had no way to prevent its operation, short of not sending fingerprints to the FBI.[80]

A subtle but important shift happened when DHS announced that Secure Communities would be mandatory. In the previous decade, as the federal government sought to enlist local support—whether through the 287(g) program, the 2002 OLC memo, the expansion of the NCIC, or direct solicitations by agency officials—its means were mostly precatory, encouraging participation without forcing the issue. And while Congress had passed laws in 1996 that formally prohibited some non-participation, the federal government had never enforced them, and they had been largely ignored.[81] Now, for the first time, the administration imposed a form of unwanted participation that many states and localities had already opposed.

Secure Communities intersects with an older federal effort to connect state prisons and local jails to the immigration system. Agents from its interior enforcement arm, Immigration and Customs Enforcement (ICE), search in per-

75. Julia Preston, *Immigration Program Is Rejected by Third State*, N.Y. TIMES (June 6, 2011), http://www.nytimes.com/2011/06/07/us/politics/07immig.html [http://perma.cc/VS4D-XK7R].

76. *Id.*; Press Release, Andrew Cuomo, Governor, N.Y., Governor Cuomo Suspends Participation in Federal Secure Communities Program (June 1, 2011), http://www.governor.ny.gov/news/governor-cuomo-suspends-participation-federal-secure-communities-program [http://perma.cc/DP6X-LE6S]; Julia Preston, *States Resisting Program Central to Obama's Immigration Strategy*, N.Y. TIMES (May 5, 2011), http://www.nytimes.com/2011/05/06/us/06immigration.html [http://perma.cc/V4WY-USCD].

77. *See* Kirk Semple & Julia Preston, *Deal To Share Fingerprints Is Dropped, Not Program*, N.Y. TIMES (Aug. 6, 2011), http://www.nytimes.com/2011/08/06/us/06immig.html [http://perma.cc/WJF9-QNVX].

78. *Id.*

79. *Id.*

80. There is some dispute as to whether DHS misled state governments about whether they could opt out of Secure Communities' fingerprint sharing. Its Inspector General's report, which exonerated the agency of *intentionally* misleading the states, acknowledged a number of instances in which agency officials told state governments they could decline. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HOMELAND SEC., COMMUNICATION REGARDING PARTICIPATION IN SECURE COMMUNITIES 8–12 (June 23, 2014), http://www.oig.dhs.gov/assets/Mgmt/2012/OIG_12-66_Jun14.pdf [http://perma.cc/V6W6-GG33].

81. Pham, *supra* note 18, at 1385; *supra* note 62 and accompanying text.

son, by reading jail logs and interrogating detainees. This occurs under the aegis of a program called the Criminal Alien Program, which traces its roots back to the post-IRCA jail-based initiatives.[82] The Criminal Alien Program accounts for some of ICE's funding spike over the last decade: from $6.6 million in 2004 to $322.4 million in 2015—a fifty-fold increase. By some estimates, "[b]etween two-thirds and three-quarters of individuals removed from the interior of the United States are removed through [the Criminal Alien Program]."[83] It can be hard to separate different programs, because their operations overlap and employees are not necessarily assigned to one or the other. But collectively, DHS's prison- and jail-focused programs—in other words, those that rely on state and local participation—account for the vast majority of its interior enforcement activity.

How does the linkage play out in practice? Once a state or local inmate comes to ICE's attention, the agency gets custody in one of two ways. The first is to ask the jailer for notification in advance of the person's release date. This allows ICE agents to pick them up, transport them to immigration detention, and either initiate proceedings or use the expedited procedures introduced in 1996.[84] This method is not always possible though. There are many reasons a person might be released from local custody—charges not filed, charges dropped, plea deals, sentences of time served or probation only, making bail—and many of them do not allow for advanced warning. To address this issue, in 2007 ICE started relying heavily on a second way to gain custody: the immigration detainer.

An immigration detainer asks for a few extra days of detention. This gives ICE agents time to get to the jail and take custody after the normal release date. The detainer form asks the recipient to maintain custody for an extra forty-eight hours, not including weekends and holidays.[85] Detainers were never a major immigration enforcement tool before the ramp-up of criminal-law-based interior enforcement. But starting in 2007, detainer use proliferated. Having issued fewer than 1,000 per month, without exception, until the start of 2006, ICE was issuing more than 10,000 every month by the end of 2007, and over 25,000 per month by 2011.[86] The detainer had become the primary mode of interior enforcement.

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82. *See supra* notes 37–40 and accompanying text.

83. Guillermo Cantor, Mark Noferi & Daniel E. Martinez, *Enforcement Overdrive: A Comprehensive Assessment of ICE's Criminal Alien Program*, AM. IMMIGR. COUNCIL 1 & n.1 (Nov. 2015), http://www.americanimmigrationcouncil.org/sites/default/files/research/enforcement_overdrive_a_comprehensive_assessment_of_ices_criminal_alien_program_final.pdf [http://perma.cc/PA9A-9JXB].

84. *See supra* note 47.

85. *See Immigration Detainer—Notice of Action*, U.S. DEP'T HOMELAND SEC. (Dec. 2012), http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf [http://perma.cc/5D5W-BQES].

86. *Further Decrease in ICE Detainer Use: Still Not Targeting Serious Criminals*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Aug. 28, 2015), http://trac.syr.edu/immigration/reports/402/ [http://perma.cc/PQ2U-WJ5U].

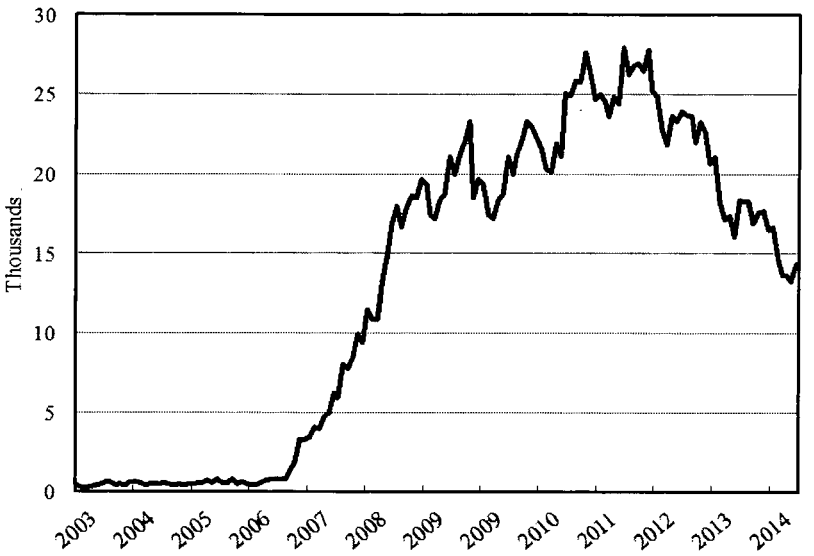

Figure 2: Detainers Issued per Month

Removals escalated as a result. The annual rate climbed above 400,000 in 2012 and 2013.[87] This was double the rate of a decade earlier, and nearly twenty times the roughly 20,000-per-year of the 1980s.[88] By 2013, interior enforcement had taken off, and subfederal governments were its primary facilitators. In the decade prior, the federal government had invited subfederal entities to participate, but to do so, their individual law enforcement officers still needed to act affirmatively, by gathering information and transmitting it to immigration officials.[89] Now, with Secure Communities, the expansion of the Criminal Alien Program, and the proliferation of detainers, local officers did not have to *do* much, or at least they did not have to make their own decisions; they just had to follow federal instructions.[90]

87. *See* ROSENBLUM, *supra* note 37, at 103 tbl.39.

88. *Id.*

89. Many did. The number of LESC inquiries skyrocketed during the 2000s. *See* U.S. Immigration & Customs Enf't, *Law Enforcement Support Center*, U.S. DEP'T HOMELAND SEC. (2007), http://services.dlas.virginia.gov/user_db/frmvscc.aspx?viewid=145 [http://perma.cc/BT4V-ADEP].

90. This is an important difference, because the sheer complexity of immigration law makes it perilous even for lawyers to interact with it. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 387 (2010) (Alito, J., concurring) (calling immigration law a "complex specialty that generally lies outside the scope of a criminal defense attorney's expertise"); *id.* at 377–85 (detailing that complexity).

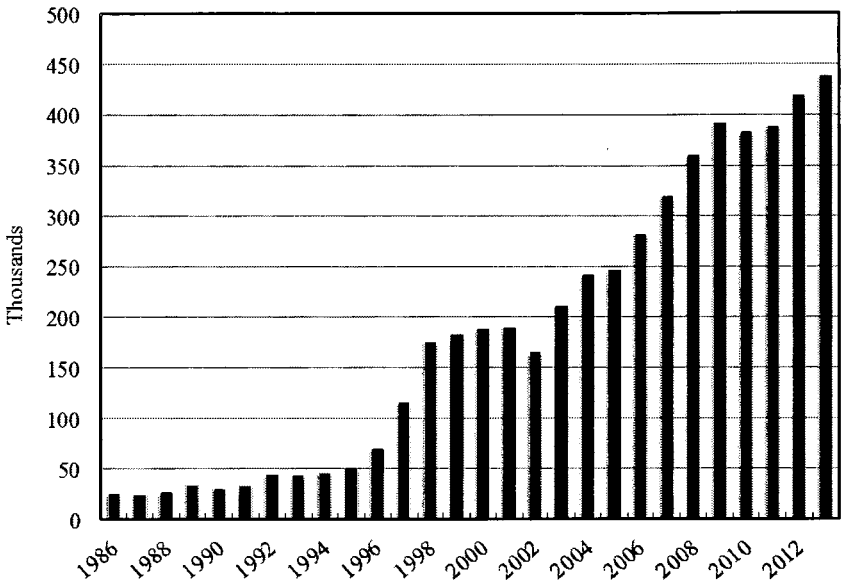

Figure 3: Removals Since IRCA

This is when the present tension began to take root. Many localities already had non-enforcement policies from the 1980s or the early 2000s, which prohibited police from investigating or reporting immigration status, but none of those policies spoke to detainers[91]—which, barely existed before 2007. The first anti-detainer and anti-notification policies were adopted in 2011 by Santa Clara County, California[92] and Cook County, Illinois.[93] Both ordinances prohibited compliance with any detainers unless DHS paid for the extra detention costs, something DHS does not do.[94] The ordinances also blocked ICE agents from interrogating inmates in the local jails. In 2012, the Connecticut Department of Corrections and several cities enacted similar policies.[95]

91. *See* Pham, *supra* note 18, at 1383 & n.44 (describing illustrative sanctuary policies from the first two waves).

92. Santa Clara County, Cal., Ordinance 3.54(3), Civil Immigration Detainer Requests (Oct. 18, 2011), http://www.ilrc.org/sites/default/files/resources/santa_clara_ordinance.pdf [http://perma.cc/H868-V3TP].

93. Cook County, Ill., Ordinance § 46-37, Policy for Responding to ICE Detainers (Sept. 7, 2011), http://www.ilrc.org/sites/default/files/resources/07-cook_county_ordinance.pdf [http://perma.cc/JBH9-3PPN].

94. *See* Letter from David Venturella, Assistant Dir., Immigration & Customs Enf't, to Miguel Márquez, Cty. Counsel, Santa Clara Cty. (Sept. 28, 2010), http://www.scribd.com/doc/38550589/ICE-Letter-Responding-to-SCC-Re-S-Comm-9-28-10 [http://perma.cc/Z6LZ-GMXV].

95. *See, e.g.*, *Administrative Directive: Inmate Admissions, Transfers and Discharges*, CONN. DEP'T CORR. 9–10 (2012), http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0903

Even so, removals kept rising. They hit a record high of 438,000 in 2013, as the Obama Administration neared its two millionth overall.[96] In late 2013, California passed the first statewide anti-detainer law. The statute prohibited compliance with detainer requests unless the subject had a certain criminal record.[97] Connecticut soon followed suit.[98] The pace of new anti-detainer policies increased dramatically in early 2014, after a district court in Oregon held a county liable for damages under the Fourth Amendment, for honoring a detainer issued without probable cause.[99] In short order, dozens of cities and counties around the country announced anti-detainer policies.[100] By mid-2014, about

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.pdf [http://perma.cc/XB96-3D2A]; COUNCIL OF THE DISTRICT OF COLUMBIA, COMM. ON THE JUDICIARY, REPORT ON BILL 19-585, IMMIGRATION DETAINER COMPLIANCE AMENDMENT ACT OF 2012, at 16 (2012), http://dcclims1.dccouncil.us/images/00001/20120604161227.pdf [http://perma.cc/APW6-CXLB]; N.Y.C., N.Y. ADMIN. CODE, ch. 1, § 9-131, Persons Not To Be Detained (2016).

For clarity, I will use "anti-detainer," "anti-notification," "anti-reporting," and "anti-inquiry" to describe the specific actions that different policies limit. Other terms—especially "sanctuary policy"—do not distinguish between these distinct forms of non-cooperation. Neither does the difference between "don't ask" and "don't tell" policies, because "don't tell" could mean either "don't affirmatively report" or "don't answer when asked." A number of jurisdictions have the former policy; only a few have the latter.

96. Ana Gonzalez-Barrera & Jens Manuel Krogstad, *U.S. Deportations of Immigrants Reach Record High in 2013*, PEW RES. CTR. (Oct. 2, 2014), http://www.pewresearch.org/fact-tank/2014/10/02/u-s-deportations-of-immigrants-reach-record-high-in-2013/ [http://perma.cc/D9ZF-4U4L].

97. Transparency and Responsibility Using State Tools (TRUST) Act, 2013 Cal. Stat. 4650 (codified at CAL. GOV'T CODE §§ 7282–7282.5 (2016)); *see* Recent Legislation, *California Limits Local Entities' Compliance with Immigration and Customs Enforcement Detainer Requests*, 127 HARV. L. REV. 2593, 2595 (2014) (listing the exceptions).

98. Act Concerning Civil Immigration Detainers, 2013 Conn. Acts 13-155 (Reg. Sess.), http://www.cga.ct.gov/2013/act/pa/2013PA-00155-R00HB-06659-PA.htm [http://perma.cc/JZ4E-NBAA].

99. Miranda-Olivares v. Clackamas Cty., No. 3:12-CV-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014).

100. *See, e.g.*, John Fritze, *O'Malley Tightens Rules on Federal Immigration Requests*, BALT. SUN (Aug. 29, 2014), http://articles.baltimoresun.com/2014-08-29/news/bs-md-omalley-immigration-policy-20140829_1_governor-o-malley-detainers-immigrants [http://perma.cc/59NC-6W8U]; Letter from Lincoln D. Chafee, Governor, R.I., to Ashbel T. Wall, II, Dir., R.I. Dep't of Corr. (July 17, 2014), http://www.ilrc.org/files/documents/rhode_island_doc.pdf [http://perma.cc/FUF9-MT2T]; Julia Preston, *Sheriffs Limit Detention of Immigrants*, N.Y. TIMES (Apr. 18, 2014), http://www.nytimes.com/2014/04/19 /us/politics/sheriffs-limit-detention-of-immigrants.html [http://perma.cc/UKS4-J5X5]; Ali Winston, *Alameda County Sheriffs Ends Detention Holds of Undocumented Immigrants*, EAST BAY EXPRESS (May 21, 2014), http://www.eastbayexpress.com/SevenDays/archives/2014/05/21/

300 states, counties, cities, and law enforcement agencies had adopted policies limiting their cooperation with detainers, and sometimes notification requests as well.[101]

Like their predecessors, this third generation of non-cooperation policies has been motivated by a mix of substantive and procedural factors. Some jurisdictions have challenged federal policy on the merits, objecting to both the level and distribution of enforcement. Most have objected to the attendant financial cost, litigation risk, and harm to community policing.[102] Unlike their predecessors, these anti-detainer and anti-notification policies have had a major impact on federal enforcement capacity,[103] because of the intervening decades' shift to interior enforcement that relies on local police.

They quickly influenced DHS's own policies as well. In November 2014, responding to the widespread opposition, DHS announced two initiatives. The first was a large deferred action program, for which several million unauthorized immigrants would have been eligible.[104] This program, however, was quickly enjoined nationwide by a district court in Texas. The Fifth Circuit upheld the injunction, and the Supreme Court split 4-4, leaving the injunction in place for the foreseeable future.[105] The other initiative was a new enforcement-

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alameda-county-sheriff-ends-detention-holds-of-undocumented-immigrants [http://perma.cc/SJ3P-5Q6G].

101. There is some uncertainty about exactly how many jurisdictions have anti-detainer policies. *Compare* Amy Taxin, *LA, Others Let Immigration Agents in the Jails, Rules Vary*, ASSOCIATED PRESS (Sept. 28, 2015, 6:22 PM), http://bigstory.ap.org/article/32718a557ffb41efa4314c32828ef05c/la-others-let-immigration-agents-jails-rules-vary [http://perma.cc/DR6N-APGA] ("roughly 340 jurisdictions"), *with States and Localities That Limit Compliance with ICE Detainer Requests*, CATH. LEGAL IMMIGR. NETWORK (Nov. 2014), http://cliniclegal.org/sites/default/files/anti-detainer_policies_11_21_14.pdf [http://perma.cc/4KKV-9W8R] ("three states, the District of Columbia, and at least 293 localities"). For a list of anti-detainer policies, and links to the documents, see *Detainer Policies*, IMMIGRANT LEGAL RES. CTR., http://www.ilrc.org/resources/detainer-policies [http://perma.cc/Q2NT-5F8Y].

102. Others have explained these motivations in greater detail. *See, e.g.*, Ming Hsu Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13, 26–35 (2016).

103. *See* LAW ENF'T SYS. & ANALYSIS, U.S. DEP'T OF HOMELAND SEC., DECLINED DETAINER OUTCOME REPORT (Oct. 8, 2014), http://cis.org/sites/cis.org/files/Declined%20detainers%20report_0.pdf [http://perma.cc/4GBK-HCMA]; *see also Further Decrease in ICE Detainer Use*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Aug. 28, 2015), http://trac.syr.edu/immigration/reports/402/ [http://perma.cc/R5U7-CHCZ].

104. Memorandum from Jeh C. Johnson, Sec'y, U.S. Dep't of Homeland Sec., Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [http://perma.cc/UU3G-ST3D].

105. Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016) (Mem.).

priorities memorandum, called the Priority Enforcement Program.[106] This program responds to both procedural and substantive objections, by favoring notification requests over detainers, and by requiring line-level agents to obtain supervisory approval before taking action against immigrants who fall outside defined enforcement priorities.[107] That said, Secure Communities' main activity—fingerprint sharing across databases—is continuing. It remains too early to tell what effect the Priority Enforcement Program will have. ICE has been issuing fewer detainers, but the distribution has not changed much.[108]

Controversy arose again in mid-2015 after the San Francisco pier killing. In its aftermath, some jurisdictions tempered their non-cooperation policies.[109] Critics, both inside and outside of Congress, began formulating ways to induce recalcitrant governments to reenter the system. Two constellations of proposals soon emerged. One would mandate compliance with notification requests.[110] The other would cut off federal funds—starting with SCAAP, but progressing through a wide range of law-enforcement and local-government grants—to jurisdictions with anti-detainer, anti-notification, and/or anti-reporting policies.[111] In early 2016, the House Appropriations Committee began to pressure the Department of Justice to enforce § 1373 through litigation.[112] That summer, the Department of Justice announced that it would deny certain law enforcement grants to jurisdictions that violated § 1373.[113] And since the 2016 presiden-

106. *See* Johnson, *supra* note 104.

107. *Id.* at 5.

108. *See Further Decrease in ICE Detainer Use*, *supra* note 103 (reporting that in April 2015, 68% of detainers still targeted people with no criminal convictions).

109. *E.g.*, Kate Linthicum, *Immigration Agents Allowed Back in L.A. County Jails, with Limits*, L.A. TIMES (Sept. 23, 2015), http://www.latimes.com/local/lanow/la-me-ln-ice-los-angeles-jails-20150922-story.html [http://perma.cc/Z2W8-EKAV]. *But see* Michael Matza, *Kenney Restores "Sanctuary City" Status*, PHILA. INQUIRER (Jan. 4, 2016), http://www.philly.com/philly/news/politics/20160105_Mayor_Kenney_restores_Philly_s_status_as_a__quot_sanctuary_city_quot_.html [http://perma.cc/W73P-WVL6].

110. *See* Press Release, Senator Diane Feinstein, Feinstein Statement on Sanctuary Cities (Oct. 20, 2015), http://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=95B00E60-C01D-4DB0-8608-62532FC5A229 [http://perma.cc/RW94-GRMN].

111. *See, e.g.*, Stop Sanctuary Policies and Protect America Act, S. 2146, 114th Cong. (2015); Enforce the Law for Sanctuary Cities Act, H.R. 3009, 114th Cong. (as passed by House on July 23, 2015). For other currently pending bills, see *Pending Legislation*, AM. IMMIGR. LAW. ASS'N, http://www.aila.org/advo-media/whats-happening-in-congress/pending-legislation [http://perma.cc/JCT5-C2NG].

112. *See* Letter from Representative John A. Culberson, to Loretta Lynch, Att'y Gen. (Feb. 1, 2016), http://culberson.house.gov/uploadedfiles/culberson_letter_to_attorney_general_lynch.pdf [http://perma.cc/6LRB-7NH7].

113. *See* Letter from Peter J. Kadzik, Assistant Att'y Gen., to Representative John A. Culberson (July 7, 2016), http://culberson.house.gov/uploadedfiles/2016-7-7_section_1373_-_doj_letter_to_culberson.pdf [http://perma.cc/MC2N-R3K5]

tial election, threats have emerged to withhold "all" funding from jurisdictions with non-cooperation policies.[114]

B. The Basic Approaches

As the last Part showed, over the past thirty years, interior immigration enforcement has become something of an adjunct to state criminal justice systems. To maintain that link, a variety of methods have been used or proposed. These methods occupy a rough continuum of pressure, from simple solicitation to hard mandate. In this Section, I will identify their basic forms and broader patterns.[115] Parts III, IV, and V will then assess their constitutional, theoretical, and normative dimensions.

1. Asks

The most basic way to enlist state and local support has been to simply ask for it. In the years after 9/11, during the first big push for local enforcement, DHS officials personally asked local governments and law enforcement agencies to investigate, report, arrest, and detain on behalf of the federal government.[116] The inducement strategy here was persuasion: federal officials trying to convince state officials that helping enforce immigration law was the right thing to do. More recently, local officials are reporting a renewed regimen of direct persuasion from immigration officials.[117]

("[T]he Department[] [of Justice] Office of Justice Programs . . . has determined that Section 1373 is an applicable federal law for the purposes of JAG and SCAAP."). It appears that no action has yet been taken to cut off any funding, perhaps because the demand for compliance with § 1373 only applies prospectively, starting with fiscal year 2017 funds. *See* Office of Justice Programs, *Additional Guidance Regarding Compliance with 8 U.S.C § 1373*, U.S. DEP'T JUST. 1 (Oct. 6, 2016), http://www.bja.gov/funding/Additional-BJA-Guidance-on-Section-1373-October-6-2016.pdf [http://perma.cc/Q3KN-EAFH] ("No FY 2016 or prior year Byrne/JAG or SCAAP funding will be impacted.").

114. *See, e.g.*, Maria Sacchetti & Meghan E. Irons, *State's "Sanctuary Cities" Risk Losing Federal Funds Under Trump*, BOS. GLOBE (Nov. 15, 2016), http://www.bostonglobe.com/metro/2016/11/14/state-sanctuary-cities-risk-losing-federal-funds/FdQaxUqoSsxFIVVSVr6zmI/story.html [http://perma.cc/SB2T-9EDF]; Julia Terruso, *Kenney: Philadelphia To Remain a Sanctuary City—For Now*, PHILA. INQUIRER (Nov. 10, 2016), http://www.philly.com/philly/blogs/heardinthehall/Kenney-Philadelphia-will-stay-sanctuary-city-for-now.html [http://perma.cc/NM9M-S5TW] ("Trump has said he would go even farther, pulling all federal funding from sanctuary cities.").

115. For a related project, which categorizes the effect of presidential action on subfederal lawmaking, see Pratheepan Gulasekaram & S. Karthick Ramakrishnan, *The President and Immigration Federalism*, 68 FLA. L. REV. 101 (2016).

116. *See supra* note 59.

117. *See, e.g.*, Matza, *supra* note 109 ("[Philadelphia Mayor] Kenney said [DHS Secretary] Johnson will send ICE representatives to Philadelphia to brief immigration

In most places, this approach has been perfectly effective.[118] Many local governments, of course, *want* to help enforce immigration law. These jurisdictions don't need any inducement at all. In practice, the same has often been true in places where participating in immigration enforcement did not yet have much political valence; those agencies would grant notification and detainer requests as a matter of course, just as they would cooperate with any other law enforcement agency. The rest of the inducement strategies have been for places where officials have been skeptical, or at least ambivalent, about helping to enforce the immigration laws.

2. Offers

To enable (and thus encourage) voluntary cooperation, the federal government has made certain resources available to local law enforcement, with little commitment attached to their acceptance. One example is the creation of the LESC hotline in 1994. Another is the expansion of the NCIC database in 2001. By giving police officers and sheriffs' deputies easy access to immigration status information, the INS lowered a barrier to entry for those who were so inclined. So did the 2002 OLC Memorandum, which purported to give legal cover for voluntary participation. Many local-enforcement bills have tried to codify this authority in statutory law.[119] Another example is the 287(g) program, which provides federal training and arrest authority to local police who want to take a more active role. Local agencies who participate are free to limit their involvement; they assume no obligations beyond compliance with federal supervision.[120] The original design of Secure Communities also took the form of an of-

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stakeholders on the new [Priority Enforcement] [P]rogram and try to explain why it does not have the shortcomings of Secure Communities."); Pham, *supra* note 18, at 1386 (describing early 2000s solicitation); Wishnie, *supra* note 17, at 1087 (same); Press Release, U.S. Dep't of Homeland Sec., DHS Releases End of Fiscal Year 2015 Statistics (Dec. 22, 2015), http://www.dhs.gov/news/2015/12/22/dhs-releases-end-fiscal-year-2015-statistics [http://perma.cc/R9K3-EKNB] ("Throughout 2015, DHS and ICE conducted a nationwide effort to implement PEP and promote collaboration, reaching out to thousands of local law enforcement agencies and government officials. The agency's Field Office Directors have briefed the program to over 2,000 law enforcement jurisdictions.").

118. While a handful of states and several hundred cities and counties have enacted non-cooperation policies, the majority have not. *See supra* note 16.

119. *See, e.g.*, Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act), H.R. 2671, 108th Cong. § 101 (2003) ("[L]aw enforcement personnel of a State or a political subdivision of a State are fully authorized to investigate, apprehend, detain, or remove aliens in the United States.").

120. The 287(g) program could technically be considered a form of conditional non-preemption, because it allows local police to act in an otherwise preempted field. *See infra* Section II.A (discussing conditional non-preemption). But because the baseline, after *Arizona v. United States*, seems to be that states lack independent authority for civil immigration arrests, see 132 S. Ct. 2492, 2505–07 (2012), I think the program is better characterized as a new offer of authority that otherwise does

fer. If states wanted, the federal government would run their fingerprints through immigration databases.[121] By signing up, states took on no new obligations.

3. Trades

Moving along the pressure continuum, the federal government has at times traded money or services for discrete pieces of enforcement assistance. The eventual "mandatory" form of Secure Communities is a prominent example. The FBI provides the service of maintaining a central criminal-justice database and responding to inquiries; in return, it forwards biometric data to DHS for immigration enforcement purposes. The FBI's service is apparently so valuable that even when DHS switched Secure Communities from an opt-in to an opt-out program, angering many state governments, not a single jurisdiction opted out.

Another potential trade is for money. For instance, many of the recent inducement proposals would condition SCAAP funding on responding to detainer and notification requests.[122] That would enact a classic Spending Clause trade: the federal government helps pay for the detention, but in exchange retains the option to extend it and know when it ends.[123] Another seemingly obvious trade is one that, curiously, has not been proposed so far: paying states and localities the cost of their help. The one time a county publicly asked if DHS would reimburse its detention costs and indemnify possible litigation costs, the agency declined.[124]

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not exist. *See also* Lucas Guttentag, *Immigration Preemption and the Limits of State Power: Reflections on* Arizona v. United States, 9 STAN. J. C.R. & C.L. 1, 19–34 (2013) (arguing that *Arizona* rejected inherent authority). Conditional non-preemption, in contrast, tends to impose federal conditions on "continued" state activity in a preemptible (but not yet preempted) field—a characterization that simply does not fit this context.

121. *See supra* notes 71–80 and accompanying text (describing the Secure Communities rollout).

122. *See supra* note 111.

123. This is not the case for every detainer or notification request, because SCAAP funds only cover unauthorized immigrants with past crimes held for at least four consecutive days. *See* Office of Justice Programs, *SCAAP Program Description*, U.S. DEP'T JUST. 1, http://ojp.gov/about/pdfs/BJA_SCAAP%20Prog%20Summary_For%20FY%2017%20PresBud.pdf [http://perma.cc/MF8W-ZDUG].

124. Letter from David Venturella, *supra* note 94; *cf.* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 817 (1998) (arguing that "the federal government should purchase [subfederal] services through a voluntary intergovernmental agreement").

4. Threats

Other Spending Clause proposals look more like threats, because they would terminate arguably separate programs as punishment for anti-detainer or anti-notification policies.[125] As Section III.C will explain, the line between trade and threat is a bit fuzzy, because it implicates the underdeveloped doctrinal distinction between spending conditions that direct the use of funds, and conditions that leverage an old program to induce the acceptance of a new one. But some conditions are surely more threatening than others. In this case, those include proposals to cut off various sources of law enforcement and general local government funding.[126] These inducements apply more pressure than offers or trades, because they do not offer new resources, they simply threaten punishment.[127]

5. Prohibitions

Hard prohibitions go a step further. The 1996 statutes banning certain anti-notification and anti-reporting policies do not mandate any affirmative activity, but they do purport to stop certain state actors from restricting their subordinates' participation. Under those laws, no government entity or official can "prohibit, or in any way restrict" another entity or official's exchange of information with federal officials.[128] This limits both the statutes that state legislatures can enact and the departmental policies that sheriffs and police chiefs can adopt. While the laws do not require the sharing of information, they remove options for preventing it.[129] Another prohibition example is 8 C.F.R. § 236.6,

125. The SCAAP cut-offs arguably do this, because that program mostly pays for ordinary criminal-law detention. On that theory, the threats in the local-enforcement bills flip SCAAP from an offer to a threat. My thanks to Cody Wofsy for pointing this out.

126. *See infra* Section III.C.1 (describing the threatened programs).

127. There is a theoretical literature about whether "offers," "trades," and "threats" are analytically separable. *See, e.g.*, Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD: ESSAYS IN HONOR OF ERNEST NAGEL 440, 447–53 (Sidney Morgenbesser, Patrick Suppes & Morton White eds., 1969); Mitchell N. Berman, *Compulsion, Coercion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 1296–97 (2013). I will leave that debate to the side, because my goal here is just to offer some basic heuristics about the amount of pressure different inducements apply, and surely terminating a separate and unrelated program applies more pressure than giving new money or authority with no strings attached. I do not suggest that these categories are legally dispositive.

128. *See* 8 U.S.C. §§ 1373(a)–(b), 1644 (2012).

129. *Id.*

which blocks public disclosure of information about immigration detainees, preempting state open records laws.[130]

6. Mandates

Finally, outright mandates occupy the furthest end of the spectrum. A 2015 proposal by Senator Diane Feinstein would simply mandate certain information-sharing.[131] This would displace all anti-notification policies by requiring state and local officials to notify ICE, upon request, of the date on which an individual is scheduled for release. This is the only inducement approach that would impose affirmative duties on state and local governments, with no possibility for opting out. It was to be introduced as an amendment to another local-enforcement bill in the Senate Judiciary Committee, but that bill eventually skirted the committee amendment process.[132]

C. The Broader Dynamics

These different kinds of pressure have not, in practice, been sealed off from one another. This Section identifies some broader patterns of federal behavior and connections between different inducement categories. Two recurring themes stand out.

First, across multiple inducement strategies, the tendency has been to place downward pressure on state discretion. In their chosen counterparties, Congress and DHS have preferred localities over states, law enforcement over legislatures, and employees over leadership. Of course, any time the federal government works with the states, it chooses which actors to interact with, and thus which to empower.[133] But in the immigration context, it has been notable how consciously and consistently federal actors have chosen to deal with increasingly lower levels of the state law-enforcement hierarchy. Secure Communities, originally conceived as a federal-state program,[134] was quickly recast as a primarily federal-local initiative. Detainers and notification requests were sent directly to local staff, without even seeking the *local* government's permission. The 287(g) program partners directly with local agencies, without seeking state or local input. The proposed funding cut-offs similarly target grants that go either to local governments or directly to local agencies. Most importantly, § 1373 enshrines

130. 8 C.F.R. § 236.6 (2016) ("No person, including any state or local government entity . . . [that] holds any detainee on behalf of the [INS] . . . shall disclose or otherwise permit to be made public the name of, or other information relating to, such detainee.").

131. *See* Press Release, *supra* note 110.

132. *See* Seung Min Kim, *GOP Punts on "Sanctuary Cities" Bill*, POLITICO (Sept. 15, 2015, 4:23 PM), http://www.politico.com/story/2015/09/sanctuary-cities-senate-republicans-bill-213652 [http://perma.cc/HH4V-9Z3P].

133. *See* Fahey, *supra* note 19 (charting this dynamic in the context of cooperative spending programs).

134. *See supra* notes 75–81 and accompanying text.

this downward pressure in law. By protecting the right of "any . . . *official*" to share immigration status information, the statute devolves discretion not just from state to local government, not just from local government to local law enforcement, but from law-enforcement policymakers to line-level police.[135]

Downward pressure has ensured fairly broad participation. While a number of states resisted Secure Communities from the outset,[136] few localities did, at least initially. Law enforcement agencies, for their part, are used to cooperating with each other as a matter of course. When detainers first came pouring in, starting in 2007, local jails largely honored them, with little fanfare. Now that there has been some pushback, each locality has had to decide whether and how much to participate. The result is a patchwork landscape, with federal capabilities varying from one county to the next.[137] Even where state laws have recentralized some of these decisions, they have left local communities with many residual implementation choices.[138]

The second pattern, while closely tied to the first, is not as easy to categorize. It operates less in the realm of law and more in the realm of manners. By sending discretion downward, the federal government has not only found itself more sympathetic counterparts, it has found ones less prone to resistance. Compared to states, localities have smaller budgets, more constrained authority, and thinner litigation resources. Many have therefore lacked the political clout, financial security, and legal resolve to resist federal pressure, even when they had concerns about participating.[139] These imbalances are even more pronounced for their line employees.

This dynamic had a real effect in the early years of detainers. Across the country, law enforcement officials professed to consider them mandatory.[140] Of course, the federal government could never actually *force* local governments to initiate or extend a detention—that would plainly violate the anti-

135. 8 U.S.C. § 1373(a) (2012); *see also* Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (explaining how devolution shifts gatekeeping power to local officers).

136. *See supra* note 76.

137. *See supra* note 16; *see also infra* Section V.A (discussing disuniformity).

138. *See* CAL. GOV'T CODE § 7282.5(a) (2016) (allowing "local law" or "local policy" to impose further restrictions on detainer compliance).

139. There are, of course, prominent exceptions. The first places to resist the flood of detainers issued under Secure Communities were Santa Clara County, California and Cook County, Illinois.

140. *See, e.g.*, Galarza v. Szalczyk, No. 10-cv-06815, 2012 WL 1080020 (E.D. Pa. Mar. 30, 2012) (holding that detainers were mandatory), *vacated*, 745 F.3d 634 (3d Cir. 2014); Julian Aguilar, *Immigration at Forefront in Travis County Sheriff Race*, TEX. TRIB. (May 7, 2012), http://www.texastribune.org/2012/05/07/immigration-forefront-travis-county-sheriff-race/ [http://perma.cc/KBD5-M4QR]; Cindy Chang, *Sheriff Baca May Defy Proposed Law Easing Immigration Enforcement*, L.A. TIMES (Aug. 25, 2012), http://articles.latimes.com/2012/aug/25/local/la-me-trust-act-20120825 [http://perma.cc/8SPT-7S7R].

commandeering rule.[141] But local officials were not sure, and the consequences for violating a federal mandate—a lawsuit, loss of federal funding—were potentially severe. This uncertainty would last until state attorneys general, and then federal courts, started prominently declaring that jails were constitutionally free to decline the requests.[142]

DHS played its part in this confusion. For many years, the language of the detainer form suggested that it might be mandatory. It stated: "[t]his request flows from federal regulation 8 C.F.R. § 287.7, which provides that a law enforcement agency 'shall maintain custody of an alien' once a detainer has been issued by DHS. You are not authorized to hold the subject beyond these 48 hours."[143] Even after a host of sheriffs made clear that they understood this to be a command, the agency largely declined to correct the record.[144] Nor did it engage directly with policymakers. Instead, it continued sending an anonymous stream of detainer and notification requests directly to jail employees. This was a softer version of § 1373's downward pressure, but its effect was the same. It loosely resembled the agency's shifting stance on whether Secure Communities was an opt-in or an opt-out program. In both cases, DHS, whether inadvertent-

141. *See infra* Section II.B.

142. *E.g.*, *Galarza*, 745 F.3d at 644–45 (holding that detainers were requests that localities could refuse); Letter from Douglas F. Gansler, Att'y Gen., State of Md. to Senator Victor R. Ramirez (Oct. 31, 2013), http://www.scribd.com/document/329650219/10-31-13-Letter-from-MD-Att-y-Gen-to-Sen-Ramirez-on-Immigration-Detainers [http://perma.cc/Q4ZV-7TNG] (same); *Information Bulletin: Responsibilities of Local Law Enforcement Agencies Under Secure Communities and the TRUST Act*, CAL. DEP'T JUST. 2 (Dec. 4, 2012), http://oag.ca.gov/sites/all/files/agweb/pdfs/law_enforcement/14-01_le_info_bulletin.pdf [http://perma.cc/ZJ97-966A] (same).

143. *Immigration Detainer-Notice of Action*, U.S. DEP'T HOMELAND SEC. (2013), http://www.ice.gov/doclib/secure-communities/pdf/immigration-detainer-form.pdf [http://perma.cc/ZL2E-K2FN]. This sentence produced a great deal of conflict and merits a closer look. The regulation it quotes states, "[u]pon a determination by the Department to issue a detainer . . . , such agency shall maintain custody of the alien for a period not to exceed 48 hours." 8 C.F.R. § 287.7(d) (2016). This language could either be a (clearly unconstitutional) command or a (clearly constitutional) limit, respectively: (1) you *must* maintain custody, but not for more than 48 hours, or (2) you *may* maintain custody, but if you do, it *must not* last longer than 48 hours. And yet the detainer form cuts off the quote before getting to the limit, thus associating the regulation only with the command; the limit comes in a separate sentence.

144. *See* KATE M. MANUEL, CONG. RESEARCH SERV., R42690, IMMIGRATION DETAINERS: LEGAL ISSUES 12–13 (2015), http://fas.org/sgp/crs/homesec/R42690.pdf [http://perma.cc/769R-EEK4] (describing confusion based on the form). DHS did concede that they were non-mandatory in litigation. *E.g.*, Defendants' Memorandum in Support of Motion for Partial Judgment on the Pleadings at *9, Moreno v. Napolitano, 2016 WL 5720465 (N.D. Ill. May 13, 2013) (No. 1:11-cv-05452).

ly or on purpose, obscured the nature of the choices being offered to state and local governments.[145]

So if the first dynamic has been downward pressure on state discretion, the second has been a selective candor about the states' range of options. In late 2014, a countervailing dynamic showed signs of emerging. In response to the latest wave of state and local resistance, DHS modulated its policies—at least ostensibly—to address some of the concerns subfederal governments were raising. After the 2016 election, however, the pendulum has swung back to confrontation. To better understand these approaches to inducement, the next Part lays out the existing constitutional doctrine that governs federal attempts to shape state behavior.

II. Inducement in Legal Context: The "Right of Refusal"

There are many ways the federal government can implement policy over and through the states. To put the inducement continuum in legal context, this Part surveys the various constitutional "rules of engagement,"[146] and then proposes a new principle that ties together the primary limits on federal power: the "right of refusal." Most simply stated, the right of refusal bars inducement strategies that deny states a meaningful option to withhold their regulatory assistance. The principle is narrow, in that it does not disturb the background rules of engagement announced in the 1980s: that Congress may induce through offers, trades, and even some threats, and it can directly regulate state governments just as it regulates private entities. But the principle is also adaptable, in that it bars *all* forms of threat, prohibition, and mandate that effectively force states to help regulate. This principle simultaneously reconciles the cooperative federalism cases of the last three decades, aligns their normative justifications, and generates insights about their future application.

A. Background Rules of Engagement

Before getting to the commandeering and coercion limits, it is important to appreciate the baseline regime over which they were drawn. In the decade before *New York v. United States*—when it started striking down statutes on federalism grounds—the Supreme Court approved some basic methods by which the federal government can regulate state governments and encourage them to help implement federal law. Four principles are most relevant for understanding modern inducement strategies.

145. *Accord* Chen, *supra* note 102, at 23–25 (describing the same dynamic); Lasch, *supra* note 18, at 698 ("There has been considerable debate and confusion over whether immigration detainers act as a federal request or as a command to state or local officials.").

146. Robert A. Schapiro, *Towards a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 285 (2005).

1. Regulating States

Congress can impose generally applicable regulations on state and local governments. In 1985, the Supreme Court held in *Garcia v. San Antonio Metropolitan Transit Authority* that Congress could extend the Fair Labor Standard Act's minimum wage and overtime provisions to state and local employees.[147] Note that this meant upholding a federal command to state governments: pay employees a minimum wage and overtime. That command, however, only required states, as employers, to do what all other employers had to do. It did not require them to use their regulatory authority in any particular way.

Garcia's rule, if not its rationales,[148] has largely survived the federalism revival of the last two and a half decades. In the first "new federalism" cases of the early 1990s, the Court reaffirmed *Garcia*'s basic holding, albeit begrudgingly.[149] Even after all the new limits of the 1990s, it has continued to uphold generally applicable federal regulation of state activities, with no concern for whether those activities are traditional, integral to state sovereignty, or anything else.[150]

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147. 469 U.S. 528 (1985). A decade earlier, in *National League of Cities v. Usery*, the Court had struck down that extension, explaining that the regulation impermissibly "displace[d] the States' freedom to structure integral operations in areas of traditional governmental functions." 426 U.S. 833, 852 (1976). *National League of Cities* had, in turn, overruled the Court's contrary decisions a decade earlier in *Maryland v. Wirtz*, 392 U.S. 183 (1968).

    In *Garcia*, a 5-4 majority overruled that decision for two primary reasons. First, the distinction between traditional and non-traditional government functions had proved overly subjective and generally unworkable. 469 U.S. at 539–45; *id.* at 548 (recognizing "the elusiveness of objective criteria for 'fundamental' elements of state sovereignty"); *see also* New York v. United States, 326 U.S. 572, 583–84 (1946) (abandoning a governmental/proprietary distinction in the context of intergovernmental tax immunity for similar subjectivity reasons). Second, and much more broadly, the Court articulated a new approach to judicial review of federalism: that the Constitution was designed to protect state autonomy through the political process, not the courts. *See Garcia*, 469 U.S. at 550–51.

148. In *Gregory v. Ashcroft*, the Court announced a clear statement rule for federal statutes regulating state decisions "of the most fundamental sort for a sovereign entity." 501 U.S. 452, 460 (1991). In dissent, Justice Blackmun—*Garcia*'s author—protested that this contravened *Garcia*'s reliance on political safeguards and rejection of attempts to identify particularly important areas of state governance. *See id.* at 477 (Blackmun, J., dissenting).

149. *See id.* at 464 ("We are constrained in our ability to consider the limits that the state-federal balance places on Congress' powers under the Commerce Clause." (citing *Garcia*, 469 U.S. 528)); *see also* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144, 160 (1992).

150. *See, e.g.*, Reno v. Condon, 528 U.S. 141 (2000).

2. Conditional Offers

Congress can trade things within its power—like money, or regulatory authority, or forbearance from preemption—for state assistance that would otherwise lie beyond its reach. In a conditional spending program, Congress offers money to states or localities, but only if they comply with certain conditions. The 1987 case *South Dakota v. Dole* confirmed that those conditions can reach subject matter beyond Congress' enumerated powers.[151] Congress can similarly impose conditions on a state's continued regulation in a field that federal law could fully occupy (this is frequently called "conditional non-preemption").[152] In *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, the Court upheld a challenge to federal mining regulations that state regulators had to enforce in order to stay in business.[153] It explained that "Congress could constitutionally have enacted a statute prohibiting any state regulation of surface coal mining," but instead "chose to allow the States a regulatory role."[154] The Court upheld an even more intrusive version the following year in *FERC v. Mississippi*.[155] Both spending and non-preemption conditions provide Congress with a powerful tool to induce assistance that it could otherwise not secure.

3. Regulatory Burdens

Otherwise-valid legislation does not violate the Tenth Amendment simply because the states must legislate or expend resources to comply. In both *Hodel* and *FERC*, the Court rejected the notion that the financial cost of compliance might render a statute unconstitutional.[156] In *South Carolina v. Baker*, the Court extended that principle to laws that required state legislation to achieve compliance.[157] Congress had effectively banned unregistered bonds, by removing the

151. 483 U.S. 203, 207 (1987) (citing United States v. Butler, 297 U.S. 1, 65 (1936)).

152. *But see* Hills, *supra* note 124, at 922–23 (criticizing this equivalency).

153. 452 U.S. 264 (1981).

154. *Id.* at 290.

155. 456 U.S. 742 (1982). A federal statute required state utility regulators to consider federal standards in setting rates, make certain reports to federal regulators, and follow certain procedures in adjudicating rate claims. The Court upheld all three, on the grounds that they were simply conditions placed on the states' continued activity in a field where Congress could have displaced them altogether. *Id.* at 765. The Court was careful to note that its holding did "not suggest that the Federal Government may impose conditions on state activities in fields that are not preemptible," and that it did "not purport to authorize the imposition of general affirmative obligations on the States." *Id.* at 770 n.32.

156. *See id.* at 770 n.33; *Hodel*, 452 U.S. at 292 n.33.

157. 485 U.S. 505 (1988).

tax exemption for interest earned on them.[158] To comply with the ban, states had to enact statutes to provide for issuing registered bonds. The Court was untroubled. It explained that the statute "regulates state activities; it does not, as did the statute in *FERC*, seek to control or influence the manner in which States regulate private parties."[159] *South Carolina* stressed that, to comply with the ban, "many state legislatures had to amend a substantial number of statutes in order to issue bonds in registered form," but the Court dismissed that concern as "an inevitable consequence of regulating a state activity."[160]

4. Clear Notice

Finally, the boundaries of cooperative programs need to be clearly stated. For instance, when Congress offers federal funds, the conditions attached to those funds must be "unambiguous[]."[161] Likewise, waivers of sovereign immunity, as conditions for program participation, must be "unmistakably clear."[162] These clear-statement rules instantiate the political-safeguards approach of *Garcia* by ensuring that impositions on state government are the product of considered federal deliberation, and that states and their constituents know what they are signing up for.[163]

B. The Commandeering Prohibition

The anti-commandeering rule appears straightforward at first blush: the federal government may not order state officials to enforce a federal regulatory program. But beneath its flat veneer lies some texture. For one thing, the federal government *can* order some state officials to enforce some federal regulatory programs. Congress can require state and local governments to pay their employees a minimum wage and overtime. It can require states to affirmatively release driving records to drivers. It can order some states to affirmatively submit voting changes to federal preclearance, and it can order state judges to hear federal causes of action. A closer look is therefore needed.

The basic rule is familiar enough. Congress may not mandate regulatory action by state legislatures or law enforcement officers. The Court had first raised this possibility in *FERC* and *Baker*. In the 1992 case *New York v. United States*, the Court struck down a provision requiring state legislatures to either provide

158. The statute did not formally ban unregistered bonds, but a Special Master had concluded—and the Court assumed—that the effect was to ban them completely. *See id.* at 511.

159. *Id.* at 514.

160. *Id.*

161. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (requiring that conditions be stated "unambiguously" to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation").

162. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985).

163. *See* Gregory v. Ashcroft, 501 U.S. 452, 464 (1991).

for the disposal of low-level radioactive waste, or take title to that waste.[164] The Court explained that "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[165] Five years later, in *Printz v. United States*, the Court struck down a provision of the Brady Handgun Violent Prevention Act requiring local law enforcement agencies to perform background checks for gun purchases.[166] It held that the federal government cannot "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[167]

The Court soon marked an outer limit to its new rule. In *Reno v. Condon*, it rejected a challenge to the Driver's Privacy Protection Act of 1994 (DPPA),[168] a statute that regulated the disclosure of personal information by state DMVs, sometimes prohibiting disclosure, sometimes requiring it.[169] The Court held that the statute did not commandeer state officials, because it did not require state legislatures "to enact any laws or regulations, and it d[id] not require state officials to assist in the enforcement of federal statutes regulating private individuals."[170] It quoted *Baker* for its distinction between federal statutes that "regulated state activities," which were permissible, and ones that sought "to control or influence the manner in which States regulate private parties," which were not.[171] The DPPA fell on the former side of that line.

Condon thus turned on the distinction between regulating states and commandeering their own regulatory processes, but it gave little explanation for where to draw that line. It was not self-evident, for instance, that a regulation of DMV information—collected from private parties in the state's licensing capacity, and used for a variety of regulatory purposes[172]—did not involve the regulation of private parties. The Court opaquely offered that the DPPA merely "regulates the States as owners of data bases,"[173] but the same could have been said of the Brady Act in *Printz*. Both statutes required state officials to search state-owned databases and send the results to private parties.[174] Instead, the real

164. 505 U.S. 152 (1992) (reviewing the Low-Level Radioactive Waste Policy Act, Pub. L. No. 96-573, 94 Stat. 3347 (1985)).

165. *Id.* at 188.

166. Printz v. United States, 521 U.S. 898 (1997).

167. *Id.* at 935.

168. Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended at 18 U.S.C. §§ 2721 *et seq.* (2012)).

169. 528 U.S. 141, 145 (2000).

170. *Id.* at 151.

171. *Id.* at 150 (quoting South Carolina v. Baker, 485 U.S. 505, 514–15 (1988) (alterations omitted)).

172. *See id.* at 145 & n.1 (describing the circumstances in which drivers' personal information might be used).

173. *Id.* at 151.

174. This cuts against interpretations that have *Condon* turning on a "database exception." *See* Kittrie, *supra* note 18, at 1489–90. If the commandeering rule did not ap-

difference between *Condon* and *Printz*, and thus between regulating states and commandeering them, lies in the next sentence of *Condon*: the Brady Act required "state officials to assist in the enforcement of federal statutes *regulating private individuals*."[175] The DPPA, by contrast, only regulated what *state* officials could do with the data in their possession.

Thus, the core question in assessing a federal directive's legality is whether the enforced statute regulates private parties. The DPPA did not directly regulate individuals; the Brady Act did. So understood, the commandeering prohibition is a fairly narrow one. The federal government can compel certain action by state executives,[176] as long as the action does not involve helping to regulate private parties.[177] There are a few exceptions, but none are relevant for present purposes.[178] The rule leaves untouched the full panoply of regulatory approaches the Court blessed in the 1980s: conditional spending, conditional nonpreemption, and regulation of states' non-regulatory activities.[179]

C. *The Coercion Prohibition*

Although the Court has not decided a commandeering challenge since *Condon*, it applied the same sort of concern for state autonomy in *NFIB*. The

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ply to federal requirements pertaining to a state's use of its databases, then *Printz* must have been wrongly decided.

175. Reno v. Condon, 528 U.S. 141, 151 (2000) (emphasis added).

176. The federal government still cannot directly compel enactments by legislatures, *see id.*, though it can effectively do so as incident to complying with mere regulations of states. *See Baker*, 485 U.S. at 514–15.

177. The Court recognized a similar distinction in *New York*, albeit implicitly: "[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." New York v. United States, 505 U.S. 152, 166 (1992).

178. For instance, state judges must hear federal claims that fall within their jurisdiction, and Congress can impose affirmative duties pursuant to its enforcement power under the Reconstruction Amendments. A third potential exception—reporting requirements—was explicitly left open in *Printz v. United States*, 521 U.S. 898, 917–18 (1997); *id.* at 936 (O'Connor, J., concurring). In Section III.A, I will argue that at least some reporting requirements should be understood to commandeer.

Finally, many have posited an exception for generally applicable laws. But it is not clear that this exception actually exists. In *Condon*, despite finding the DPPA to be generally applicable, the Court rejected the commandeering challenge for a different reason: the statute merely regulated the states, as in *Baker*. If general applicability cured commandeering, the Court could have just cited *Garcia* and been done with it. At any rate, none of my arguments turn on the existence *vel non* of such an exception, because the inducement approaches I analyze are not capable of non-governmental application.

179. *See Printz*, 521 U.S. at 936 (O'Connor, J., concurring) (emphasizing that the Court was not cutting off any other inducement options).

new limits on conditional spending are crucial for assessing Congress's range of inducement options generally. In immigration specifically, many of the new inducement proposals are spending threats, as in *NFIB*. But *NFIB*'s doctrine is hard to parse, both because of its 3-4-2 split, and because the opinions did not give detailed instructions for future application. This Section lays out what we know, after *NFIB*, about Tenth Amendment limits on the Spending Clause.[180]

Before *NFIB*, the leading Spending Clause case was *South Dakota v. Dole*. *Dole* involved a statute that conditioned five percent of a state's federal highway funds—less than half a percent of its overall budget—on the state's enacting a drinking age of twenty-one.[181] In upholding the statute, the Supreme Court announced two rules that are particularly relevant to the current inducement debates. The first is that spending conditions need to be germane to the purpose of the funds to which they are attached.[182] The majority declined to "define the outer bounds of the 'germaneness' or 'relatedness' limitation," because any such limitation was satisfied: "the condition imposed by Congress is directly related to one of the main purposes for which highway funds are expended—safe interstate travel."[183] Still, that analysis, while terse, provides a significant clue that germaneness is to be analyzed at a high level of generality. The majority was satisfied that the condition related to a modifier ("safe") that could plausibly attach to the actual purpose of highway funds ("interstate travel"). That sort of analysis leaves Congress free to impose a broad set of requirements on the activities it funds. Indeed, in the decades after *Dole*, lower courts have applied the germaneness requirement quite deferentially.[184]

The second relevant piece of *Dole* was also hypothetical. The Court reiterated a possibility it had recognized in the 1930s—that "the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[185] But the Court found that the threatened cut-off—which represented less than one percent of a state's overall budget—only con-

180. Others have undertaken this project in greater detail. *See* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 GEO. L.J. 861 (2013); Lynn A. Baker, *The Spending Power After* NFIB v. Sebelius, 37 HARV. J.L. & PUB. POL'Y 71 (2014); Berman, *supra* note 127. I will note points of agreement and difference along the way.

181. 483 U.S. 203, 205 (1987) (describing 23 U.S.C. § 158 (2012)).

182. *Id.* at 207–08. The majority in *Dole* did not definitively endorse this requirement, but at least six Justices in *NFIB* did. *See* Nat'l Fed'r of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2634 (2012) (Ginsburg, J., dissenting); *id.* at 2659 (joint dissent); *see also id.* at 2604 (Roberts, C.J.) (recounting *Dole*'s germaneness holding).

183. *Dole*, 483 U.S. at 208 & n.3. The Court also concluded that South Dakota had conceded the condition's germaneness. *Id.*

184. *See* Koslow v. Pennsylvania, 302 F.3d 161, 175–76 (3d Cir. 2002) (rejecting germaneness challenge in SCAAP context); Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 466–67 & nn.47–49 (2003) (collecting cases).

185. *Dole*, 483 U.S. at 212 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

stituted a "relatively mild encouragement," which left states the choice to turn it down "not merely in theory but in fact."[186]

Until 2012, the Supreme Court had never invalidated a spending condition as too coercive. But in *NFIB*,[187] it struck down the provision of the Affordable Care Act (ACA) that conditioned all of a state's Medicaid funding on its acceptance of the statute's expansion of Medicaid. Previously, Medicaid covered "certain discrete categories of needy individuals—pregnant women, children, needy families, the blind, the elderly, and the disabled."[188] The ACA's expansion covered "all individuals under the age of 65 with incomes below 133 percent of the federal poverty line."[189] Seven Justices voted to strike down the condition, but they split between a four-Justice "joint dissent" and a three-Justice opinion written by Chief Justice Roberts.

The joint dissenters espoused a broad rule. In their view, a big enough offer, even with no threat to previous funds, might be too big for state officials to refuse, especially with their citizens paying for the program through federal taxes. The danger, they said, was that such grants allow Congress to reach into "areas traditionally governed primarily at the state or local level."[190] Reaching that area, however, was not necessary to their holding; they would have invalidated the Medicaid expansion even after acknowledging that healthcare finance is generally subject to federal regulation.[191] Under the joint dissent's rule, any sufficiently large federal grant could be unconstitutional.

The Chief Justice's opinion was narrower.[192] He relied on two necessary propositions. First, he viewed the Medicaid expansion as a different program from prior Medicaid. The condition therefore did not simply change the terms of eligibility for an existing program; it threatened to cut off existing funds if the states did not agree to carry out a *new* one. Had the expansion merely modified the terms of the existing Medicaid program, the Chief Justice gave every indication that the statute would have survived.[193] Coercion is therefore only possible

186. *Id.* at 211–12.

187. 132 S. Ct. 2566 (2012).

188. *Id.* at 2601 (citing 42 U.S.C. § 1396a(a)(10) (2012)).

189. *Id.* (citing 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII)).

190. *Id.* at 2662 (joint opinion of Scalia, Kennedy, Thomas & Alito, JJ.).

191. *Id.* at 2644 (acknowledging that "*purchasing* insurance *is* 'Commerce'" within the meaning of the Commerce Clause (emphasis in original)).

192. *See* Bagenstos, *supra* note 180, at 867–68, 868 n.24 (calling this "the Court's pivotal opinion" because it was both narrower than the joint dissent and necessary to reach a majority).

193. *See NFIB*, 132 S. Ct. at 2603–04. He characterized *Dole* in similar terms, explaining that the Court had looked for coercion *only* because "the condition was not a restriction on how highway funds . . . were to be used." *Id.* at 2604. This distinction dates back to *United States v. Butler*, 297 U.S. 1, 73 (1936), in which the Court pointed out the "difference between a statute stating the conditions upon which moneys shall be expended and one effective only upon assumption of a contractual obligation to submit to a regulation which otherwise could not be enforced."

where a condition does not direct the use of the funds; this much was explicit. Implicitly, the germaneness requirement does not come into play, either, because in that situation, the conditions effectively define the funds' purpose. For instance, in *Dole*, the funds were "highway funds" because Congress required them to be spent on highway construction. In other words, there is no case in which conditions that direct the use of funds could fail a germaneness test, because the condition *is* the purpose.

Second, having decided that the condition was meant only to pressure, the Chief Justice looked at whether the threat, as a percentage of total state budgets, was coercive. He concluded that "[t]he threatened loss of over 10 percent of a State's overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."[194] By contrast, in *Dole*, the threatened highway funds had accounted for less than one percent of the total state budget. The joint dissent also looked to percentages of state budgets, both on average and in illustrative cases.[195]

Together, *Dole* and *NFIB* establish a three-step Spending Clause doctrine. If a condition directs the use of the funds, it is constitutional. If not, then it must be germane to the purpose of the funds. Even if it is germane, it must still not be coercive. Comparing *Dole* and *NFIB*, a coercive condition threatens somewhere between one and ten percent of the government's total budget. Between those poles, neither the Supreme Court nor the lower courts have had occasion to identify a more exact boundary.[196]

D. The Right of Refusal

This Section distills a unified principle to fuse the ostensible silos of cooperative federalism: the right of refusal. Simply stated, the right of refusal prohibits any form of inducement that would meaningfully eliminate a state's ability to decline to help implement a federal regulatory scheme. The principle is comprehensive, in that it reaches forms of regulatory compulsion beyond those at issue in *New York*, *Printz*, and *NFIB*, but it is narrow, because it is bounded by the limits of *Garcia*, *Baker*, and *Condon*. In other words, within its small domain, the right is absolute.

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194. *NFIB*, 132 S. Ct. at 2605.

195. *Id.* at 2662–64. In both cases, the Court also noted the threatened percentage of the program's budget. In *Dole*, it was 5% of highway funds, *id.* at 2604; in *NFIB*, it was 100% of prior federal Medicaid funds, or 50% to 83% of total state Medicaid expenditures. *Id.* at 2663. But I doubt that this program-specific percentage can be independently relevant to the coercion analysis. It neither captures the actual amount of pressure on state officials (which depends on the size of the program) nor provides a basis to distinguish the coerciveness of different cut-off threats.

196. *See id.* at 2606–07 ("It is enough for today that wherever that line may be, this statute is surely beyond it."); South Dakota v. Dole, 483 U.S. 203, 211–12 (1987); Steward Mach. Co. v. Davis, 301 U.S. 548, 591 (1937) ("We do not fix the outermost line. Enough for present purposes that wherever the line may be, this statute is within it.").

My goal in this Section is interpretive—to explain how the Court's cases fit together in a coherent way.[197] But the right of refusal is more than a descriptive heuristic; it also adds analytic clarity to the cases' normative and doctrinal dimensions. This Section is backward-looking: it explores the right of refusal's role in Tenth Amendment jurisprudence. The next Part is prospective: it puts these claims to the test by applying the right of refusal to some fairly novel—but potentially pervasive—inducement strategies.

According to *NFIB*, commandeering and coercion are two sides of the same coin. As the Chief Justice put it, "[t]he Constitution simply does not give Congress the authority to require the States to regulate."[198] Before *NFIB*, that statement would have only described commandeering. But now, it occurs when "Congress directly commands a State to regulate or indirectly coerces a State to adopt a federal regulatory system as its own."[199] The joint dissenters drew on the same reasoning. After stating the anti-commandeering rule, they explained that "Congress effectively engages in this impermissible compulsion when state participation in a federal spending program is coerced, so that the States' choice whether to enact or administer a federal regulatory program is rendered illusory."[200] According to at least seven Justices, then, commandeering and coercion are merely variants, formal and functional, on the same principle: states and their officials must have a meaningful right to refuse participation in federal programs.[201]

There are indications, moreover, that the right to withhold that participation is broader than the sum of the anti-coercion and anti-commandeering doctrines—that is, the federal government may not force the states to help regulate even if it does so without using direct commands or spending conditions. One indication is that the Court first recognized the possibility of uncon-

197. Others have undertaken related projects to imagine what rights the Tenth Amendment should protect. *See* Hills, *supra* note 124, at 819 ("*New York* entitlement"); Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 8 (2010) ("entitlement to federal noninterference").

198. *NFIB*, 132 S. Ct. at 2602 (quoting New York v. United States, 505 U.S. 144, 178 (1992)).

199. *Id.* (emphasis added).

200. *Id.* at 2660 (joint dissent).

201. Both the Chief Justice and the joint dissent in *NFIB* repeatedly described their holdings in terms of the states' right to refuse participation. *See id.* at 2608 ("States may now choose to reject the expansion; that is the whole point."); *id.* at 2603 ("[W]e look to the States to defend their prerogatives by adopting the simple expedient of not yielding to federal blandishments when they do not want to embrace the federal policies as their own." (internal quotation marks omitted) (quoting Massachusetts v. Mellon, 262 U.S. 447, 482 (1923))); *id.* at 2604–05 (recognizing a state's "'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact'" (quoting *Dole*, 483 U.S. at 211–12)); *id.* at 2661 (joint dissent) ("[T]he legitimacy of attaching conditions to federal grants to the States depends on the voluntariness of the States' choice to accept or decline the offered package.").

stitutional regulatory coercion in *Steward Machine Co. v. Davis*, a case that did not involve threats to withhold any federal-state funds.[202] Another indication is that, more recently, several Justices raised the possibility of coercion-without-spending-conditions during the oral argument in *King v. Burwell*.[203] The question in *King* was whether the Affordable Care Act allowed subsidies for health insurance purchasers in states that declined to set up their own exchanges—a possibility that would have destroyed the healthcare markets in states that refused to help implement the program.[204] Justice Kennedy observed that "the States are being told either create your own Exchange, or we'll send your insurance market into a death spiral," and he called this "a serious constitutional problem."[205] Both Justices who dissented on the coercion issue in *NFIB* agreed.[206] These inclinations make sense: there are ways the federal government might take away a state's refusal ability that do not involve commandeering or spending conditions. The right of refusal I have identified protects states from *any* such inducement.

A few things are gained by casting the doctrine in these terms. For one thing, it aligns many of the justifications for the coercion and commandeering bans. If it is not a good idea to let the federal government mandate state regulation, then it is probably not a good idea to let it coerce state regulation either.[207] Pre-*NFIB* scholarship recognized the coercive potential of spending threats, but often treated this as an indication of anti-commandeering's incoherence.[208] Aligning their core concerns allows us to start evaluating and applying the larg-

202. 301 U.S. 548 (1937). The statute in *Steward Machine* granted a large tax rebate to companies who paid into state unemployment insurance programs that met federal standards, thus pressuring states to implement such programs. The Court upheld the program, but suggested that some greater amount of pressure might exert "a power akin to undue influence," crossing "the point at which pressure turns into compulsion." *Id.* at 590.

203. Transcript of Oral Argument at 15–20, King v. Burwell, 135 S. Ct. 2480 (2015) (No. 14-114).

204. *See King*, 135 S. Ct. at 2493.

205. Transcript of Oral Argument at 16, *King*, 135 S. Ct. 2480 (No. 14-114).

206. Justice Sotomayor asked "how that is not coercive in an unconstitutional way." *Id.* at 15. Justice Ginsburg found it anomalous for a statute to say that if states do not participate, "then you get these disastrous consequences." *Id.* at 20.

207. Of course, other normative dimensions of the doctrines might still vary—for instance, their judicial administrability. Even if both commandeering and coercion are likely to produce the same goods and harms, the former line is far brighter.

208. *See, e.g.*, Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1656–57 (2006) ("[T]he Court's general categories distinguishing permissible from impermissible kinds of federal legislation do not withstand a functional analysis grounded in the values typically associated with federalism."); *see also* Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2202 (1998) (noting that conditional spending and preemption raise some of the same accountability concerns as commandeering).

er principle, instead of lamenting its absence. (I take on some of these normative questions in Part IV.) The right of refusal similarly ties these harder Tenth Amendment limits to the Court's softer federalism-protecting clear-statement rules: states cannot meaningfully exercise their right of refusal over grant conditions and sovereign immunity waivers that they do not know about.[209]

Recognizing the larger principle also allows us to predict how the inducement jurisprudence might apply in future cases. The most obvious insight is that some forms of conditional non-preemption are probably invalid after *NFIB*.[210] If Congress, as a penalty for not administering a federal program, threatened to kick the states out of a crucial regulatory area, with no federal fallback, it is hard to see how such a provision would preserve the state's functional right to refuse participation. True, in *FERC*, the Court brushed aside a similar scenario.[211] But that was before *New York*, *Printz* (which minimized the coercion at play in *FERC*),[212] and *NFIB*. Justice Blackmun—who, in *Garcia*, foreswore any judicial role in policing federalism—was still the swing vote on federalism issues. Today's federalism jurisprudence has evolved considerably. The rule announced in *NFIB* cuts off one possible circumvention of the commandeering prohibition.[213] If a future case presented another substitute, there is no reason to think the Court would not follow the same course.[214]

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209. *See supra* Section II.A. The Chief Justice in *NFIB* was equally concerned with notice; he insisted at length that when states originally signed up for Medicaid, they could not have foreseen the ACA's expansion. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2605–06 (2012). Why should that matter? Because it means states were never given the choice to turn it down.

210. The Court arguably raised this possibility as early as 1999. *See* Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expenses Bd., 527 U.S. 666, 687 (1999) ("In any event, we think where the constitutionally guaranteed protection of the States' sovereign immunity is involved, the point of coercion is automatically passed—and the voluntariness of waiver destroyed—when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.").

211. FERC v. Mississippi, 456 U.S. 742, 766–78 (1982).

212. Printz v. United States, 521 U.S. 898, 926 (1997).

213. In principle, at least. The broader rule announced in *NFIB*—that Congress cannot effectively force state actors to implement federal programs using crippling threats to separate programs—practically follows from *New York*. But by acknowledging that this makes sense in the abstract, I do not mean to endorse the Court's *application* of that principle, in which it held that a large-enough change in Medicaid eligibility somehow created a separate program. It is not clear how courts should identify this line between eligibility changes and new programs.

214. Professor Roderick Hills argued for a similar rule shortly after *Printz*, albeit based on a slightly different rationale. *See* Hills, *supra* note 124, at 921–27. The rule he proposed would protect states from preemption threats whose sole purpose was leverage; the rule I am imputing to the Court, while cognizant of purpose, would primarily ask whether the choice to accept preemption is *actually* available, even if the condition enacts what Hills argues is a permissible purpose: forcing states to internalize the cost of harmful behavior.

The right of refusal similarly illustrates the scope of the commandeering and coercion rules themselves. If they are a part of the same broader principle, then it seems fair to apply them—and not apply them—in similar situations. So, for instance, just as the anti-commandeering rule prohibits both compelled *enactment* by state legislatures (like the waste-disposal program in *New York*) and compelled *enforcement* by state executives (like the background checks *Printz*), the anti-coercion rule also protects executive enforcement actors, even though *NFIB* only addressed legislative enactment.[215] Inversely, under the right of refusal, the coercion ban would only prevent the same limited set of harms as the commandeering ban: federal laws that co-opt state *regulatory* processes, not federal laws that simply regulate the states themselves.[216] If Congress can directly impose, say, a minimum wage, it can probably also impose one as a condition on federal funds or non-preemption.[217]

One final common thread bears mentioning. In both sets of cases, a number of Justices revealed a certain preoccupation with congressional purpose, criticizing federal action whose conscious intent was to force state participation. In *NFIB*, the Chief Justice reached the coercion question only after deciding that the termination threat "serve[d] no purpose other than to force unwilling States to sign up for the dramatic expansion."[218] He cited evidence that Congress "recognized it was enlisting the States in a new health care program."[219] The joint dissenters did the same, documenting at length that "Congress well understood that refusal was not a practical option."[220] This echoed the criticism in *Printz* that "it is the whole object of the law to direct of the functioning of the executive, and hence to compromise the structural framework of dual sovereignty."[221]

To be sure, improper purpose was not exactly a part of the *doctrine* in either case.[222] But doctrine is often a way to operationalize purposive inquiries.[223] And

215. *See infra* Section III.C.3 (discussing local coercion).

216. *See supra* notes 168–78 and accompanying text.

217. *See infra* note 242; *see also* Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 59–60 (2006) ("It is clear that a funding condition cannot be unconstitutional if it could be constitutionally imposed directly.").

218. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603 (2012) (emphasis added).

219. *Id.* at 2606.

220. *Id.* at 2664–65 (joint dissent); *see also id.* (considering the ACA's "goal"); *id.* at 2666 ("[I]t is perfectly clear from the goal and structure of the ACA that the offer of the Medicaid Expansion was one that Congress understood no State could refuse."). Justice Ginsburg noted this preoccupation as well. *See id.* at 2640 n.25 (Ginsburg, J., concurring in part and dissenting in part) ("The joint dissenters also rely heavily on Congress' perceived intent to coerce the states.").

221. Printz v. United States, 521 U.S. 898, 932 (1997) (emphasis omitted).

222. Professors Bagenstos and Berman have debated the relevance of purpose in *NFIB*. *See* Bagenstos, *supra* note 180, at 894–98; Berman, *supra* note 127, at 1286, 1312 nn.131–32. My position is somewhere in between: I agree with Bagenstos that pur-

more importantly, these flourishes hint at the underlying concerns of the authoring Justices, who are free to tailor the doctrine accordingly going forward. In future cases, inducement strategies will be most vulnerable when it looks like Congress, the President, or a federal agency is consciously trying to suppress the states' ability to assert their refusal prerogatives.

III. Novel Inducement Strategies and the Right of Refusal

Despite the doctrinal convergence heralded by *NFIB*, the law of cooperative federalism remains underdeveloped. Immigration enforcement pushes a number of its boundaries. This Part considers what the emerging right of refusal augurs for the particular inducements that are being tested or proposed in immigration law: mandatory information sharing, prohibitions against certain sanctuary policies, and local spending threats. Each method has application far beyond immigration. Anytime the federal government wants information from the states, it will be easier to demand it. Anytime it seeks help with enforcement, double-negative or spending-threat inducements will present fast routes to compliance. The legality of these approaches should therefore be of pressing concern in many areas of federal law.

A. Mandatory Information Sharing

In response to the resistance of recent years, one proposal would mandate that state and local officials answer federal notification requests.[224] Proposed by Senator Diane Feinstein in the summer of 2015,[225] this approach would test a longstanding uncertainty in commandeering doctrine. In *Printz*, the majority reserved the question of whether statutes "which require only the provision of information to the Federal Government" are constitutional.[226] It contrasted

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pose is not a part of the doctrine, but I agree with Berman that it appears to be a core motivation behind many Justices' thinking. The Chief Justice's opinion implicitly approved a purpose to apply pressure, but not a purpose to disable the refusal option altogether.

223. This is well known in the context of fundamental rights, but it can also be true in structure cases. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986) (using multifactor test to ensure that Congress does not act "for the purpose of emasculating constitutional courts" (internal quotation marks omitted)).

224. *See supra* note 84 and accompanying text (explaining the use and significance of notification requests).

225. The proposed mandate would only have applied to immigrants with certain criminal convictions, and would have required probable cause of removability. *See* Press Release, *supra* note 110.

226. *Printz*, 521 U.S. at 918; *see also id.* at 936 (O'Connor, J., concurring) ("[T]he Court appropriately refrains from deciding whether other purely ministerial reporting requirements imposed by Congress on state and local authorities pursuant to its Commerce Clause powers are similarly invalid.").

those statutes with ones that force the "participation of the States' executive in the actual administration of a federal program,"[227] but made clear that it was not opining one way or another: "it will be time enough to do so if and when their validity is challenged in a proper case."[228]

In this Section, I argue that this kind of mandate would be hard to square with the right of refusal the Court now recognizes.[229] Recall that in *Condon*, the Court clarified that the anti-commandeering rule protects against a very specific type of law: one that requires "state officials to assist in the enforcement of federal statutes regulating private individuals."[230] There is little question that a notification mandate is such a law. The immigration laws regulate private individuals, and notification assists in the enforcement of those statutes—in fact, it is one of the interior enforcement system's two main pillars (the other is the detainer).

One might counter that, while notification might help the *federal* government enforce immigration law, it does not make the *state* do any enforcing. After all, it is the federal government that ultimately takes coercive action against the individual; the state merely shares a name and a date. *Printz* answers this contention. Under the Brady Act, chief law enforcement officers did not have to actually prevent or prosecute unlawful gun transfers; they were only responsible for the investigative phase of the program—the background check. So too here. Forced notification would compel law enforcement to take one of *the* necessary steps in the enforcement process. To the regulated individual, this notification can have the same effect as a new arrest. Thus, in this context, there is not much daylight inside *Printz*'s distinction between "the provision of information" and "the actual administration of a federal program."[231]

In addition to helping implement a statutory scheme that governs individuals, a mandatory reporting duty would place demands on the states' own regulatory machinery, the precise harm identified in *Baker*, *New York*, and *Condon*. Such a mandate would forcibly tap into the states' criminal enforcement process, the entirety of which is required to produce the arrest, possible conviction, and detention that lead to a release date. As I have discussed, this authority to police for ordinary criminal violations is precisely what makes states' services so valuable to federal immigration agents. But, as a result, the federal government could not claim that it is drafting something other than the states' regulatory processes into service.

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227. *Id.* at 918.

228. *Id.*

229. For a similar argument, see Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103 (2012).

230. Reno v. Condon, 528 U.S. 141, 151 (2000).

231. *Printz*, 521 U.S. at 918; *see* Evan H. Caminker, Printz, *State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199, 235 ("[T]he primary duty imposed by the Brady Act itself is a 'reporting' requirement of sorts."); Mikos, *supra* note 229, at 156.

Another counter might be that, by the time of release, the states' regulatory process is over, so the notification mandate does not impose any new burden.[232] This objection is wrong for multiple reasons. At the outset, it begs the question of what actions are "regulatory." It also is not correct that notification is costless. As Professor Robert Mikos has forcefully argued, reporting requirements can impose high "dynamic costs," meaning that they make *future* police work harder, by reducing incentives for immigrant communities to cooperate with police.[233] The testimony of law enforcement officials across three decades bears out this concern.[234] Notification, no less than detainers, can limit state and local governments' ability to provide basic services to their citizens.

Those dynamics raise some of the same accountability concerns voiced in *Printz*. Forced notification may put local governments "in the position of taking the blame for [the] burdensomeness and . . . defects" of immigration law.[235] Even if constituents understand the nature of the federal mandate, local police are still the ones who may be punished by a loss of community cooperation, and by the threat of litigation.[236] In any case, it is not clear that the scope of harm is even relevant to the Tenth Amendment analysis. Per *Printz*, even a "minimal and only temporary burden upon state officers" is impermissible when "it is the whole *object* of the law to direct the functioning of the state executive."[237]

To be sure, some forms of reporting might be distinguished as "purely ministerial," in the words of Justice O'Connor's *Printz* concurrence,[238] like information used for research purposes, or information used to track *states'* compli-

232. *See, e.g.*, United States v. Brown, No. 07 Cr. 485(HB), 2007 WL 4372829, at *5 (S.D.N.Y. Dec. 12, 2007) (rejecting challenge to reporting requirement because "it merely requires state officials to provide information . . . that the state officials will typically *already have* through their own state registries" (emphasis added)); Freilich v. Bd. of Dirs. of Upper Chesapeake Health, Inc., 142 F. Supp. 2d 679, 697 (D. Md. 2001) (rejecting challenge to reporting requirement on the ground that "[i]t merely requires the state to forward information to a national data bank that the state *already collects on its own* under its own state laws" (emphasis added)), *aff'd*, 313 F.3d 205, 213–14 (4th Cir. 2002).

233. *See* Mikos, *supra* note 229, at 121, 154–64.

234. *See* Brief for Major Cities Chiefs Ass'n et al. as Amici Curiae Supporting Petitioners at 6–11, Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (No. 15-674); *supra* notes 32, 63, 102. *But see* Adam B. Cox & Thomas J. Miles, *Legitimacy and Cooperation: Will Immigrants Cooperate with Local Police Who Enforce Federal Immigration Law?* (Inst. for Law & Econ., Working Paper No. 734, 2015) (reporting null result in correlation between Secure Communities activation and rate at which serious crimes are solved).

235. *Printz*, 521 U.S. at 930.

236. *See infra* Section IV.D (discussing how immigration enforcement fits into debates about federalism and accountability).

237. *Printz*, 521 U.S. at 932 (internal quotation marks omitted).

238. *Id.* at 936 (O'Connor, J., concurring) (citing 42 U.S.C. § 5779(a) (2012)).

ance with valid *Garcia*- or *Baker*-type regulations.[239] The right of refusal does not protect against those forms of compulsion. But other schemes that demand information necessary to enforce federal statutes against *individuals*—like tax or marijuana laws—would probably fall on the wrong side of that line. If the Tenth Amendment protects regulatory refusal against all intruders, it is hard to see why there should be an exception for this form of regulatory mandate.

B. Double-Negative Prohibitions

What about the relatively softer path of prohibition? To recap, in 1996, IIRIRA provided that a state or local "entity or official may not prohibit, or in any way restrict, any government entity or official from" sharing immigration-status information with the federal government.[240] This double negative is not the same as a single positive—it does not *mandate* any communication; it simply preserves the ability to communicate. The few scholars and lower courts to consider these statutes have generally concluded that they comply with the Tenth Amendment, though their reasoning has varied.[241] After *NFIB*, however, this inducement strategy may be on thin ice.

For a double-negative statute like § 1373 to be constitutional, one of two things must be true. Either the underlying action must be one that Congress could command or the double-negative form must turn what otherwise was commandeering into a permissible form of preemption. The first possibility is less troubling. If Congress can mandate an action, it can probably also preserve the choice to take that action, which is a less intrusive approach.[242] Thus, if Congress could directly impose mandatory notification, then § 1373 is probably constitutional. But, as the last Section explained, there are good reasons to doubt that Congress could impose mandatory notification. The statute's legality therefore depends on the second possibility.

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239. *See, e.g.*, 26 U.S.C. § 6051(a), (d) (2012) (requiring states to report employee income to the IRS).

240. 8 U.S.C. § 1373(a) (2012); *see also id.* § 1644. Of course, § 1373 may not apply to policies restricting release-date notification, because release dates are not "information regarding the citizenship or immigration status." *Id.* § 1373(a).

241. Some have relied on the fact that they are prohibitions, not commands. *See* Pham, *supra* note 18, at 1407–08; Rodríguez, *supra* note 33, at 601 n.147. Others have argued that "*Condon* exempts from the anti-commandeering doctrine any . . . regulation of states as the owners of databases." Kittrie, *supra* note 18, at 1497–98, 1501 (arguing that Congress could use the same exception to justify a notification mandate).

242. To be sure, greater-includes-the-lesser reasoning like this does not always apply in constitutional analysis. *See* Mitchell N. Berman, *Commercial Speech and the Unconstitutional Conditions Doctrine: A Second Look at "The Greater Includes the Lesser,"* 55 VAND. L. REV. 693, 710 n.60 (2002). This might be the case when the lesser regulation imposes distinct harms, the way a ban against advertising an activity might upset First Amendment values in a way that outright prohibition of that activity would not. Here, however, the lesser regulation does not impose any harms distinct from the greater one.

There are at least three problems with the idea that the double-negative form cures any commandeering problem—in other words, that a double-negative statute is constitutional even where a single positive would not be. First, the distinction between positive and negative phrasing cannot be dispositive. Plenty of positive commands comply with the anti-commandeering rule, as in *Garcia* and *Condon*. Likewise, many impermissible commands could be phrased as prohibitions.[243] For instance, in *Printz*, the Brady Act could have prohibited law enforcement from declining requests for background checks without a change in meaning. Section 1373 could have equally said "all state governments *must* confer discretion on their employees to report immigration information."[244] Finally, after *NFIB*, we know that the right of refusal is more functional than a rigid positive-negative distinction. The Affordable Care Act did not issue a literal command; it simply authorized the Secretary of Health and Human Services to withhold federal funds.[245] But the Court looked past that, to the law's actual effect and purpose.

The effect of § 1373 is the second reason to question its ongoing viability. It does not simply confer an authority that might not otherwise exist; local officials were always free, absent a contrary state or local regulation, to share information. Rather, it cuts off the ability of state and local policymakers—and thus of state and local electorates—to decide whether to participate in immigration enforcement. This would sever some important lines of authority within state government: state legislatures could not supervise state agencies or local governments, local governments could not supervise local agencies, and agency chiefs could not supervise their employees.

If the double-negative form cured what would otherwise be forbidden, Congress could restructure state authority over a vast array of regulatory decisions. In immigration, it could prohibit anti-detainer policies as well. Beyond immigration, it could mandate that sheriffs' deputies be allowed to complete Brady Act background checks. It could prohibit departmental policies against arresting for federal marijuana violations. It could prevent state political branches from restricting their insurance commissioners' authority to establish health care exchanges.[246] The possibilities are endless. When Congress, in offer-

243. *See* Hing, *supra* note 17, at 277 ("Most duties can be characterized either way."). For a related argument that Congress could not prohibit states from repealing criminal statutes, see Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power To Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1445–52 (2009).

244. That is, in fact, its effect. One could mount a case that, because state officers' authority comes from state law, see *Miller v. United States*, 357 U.S. 301, 305–06 (1958); and *United States v. Di Re*, 332 U.S. 581, 589 (1948), section 1373 functions as a command to the state legislature to confer the relevant authority.

245. *See* 42 U.S.C. § 1396c (2012).

246. *See* Fahey, *supra* note 2 (explaining that hybrid health insurance exchanges under the ACA, which allowed insurance commissioners to participate despite their governor's disapproval, still required "the state's insurance commissioner [to] attest to HHS that he or she had the authority under state law to perform the relevant oversight functions"). Even so, HHS's efforts to single out sympathetic officials in

ing a federal program, designates what Bridget Fahey has termed a "consent agent"—an official who is authorized to sign up for the program—it generally works within the state's pre-existing distribution of authority.[247] Double negative statutes go a step further. By dictating where the right of refusal *must* be located—in § 1373's case, in the hands of thousands of line-level employees—Congress purports to mandate a particular distribution of state authority.[248]

There is, of course, a very good reason why Congress has tried to place the right of refusal where it has. The third reason for doubt, and perhaps the most important, is the statute's purpose.[249] As I explained in Section I.C, inducement strategies that put downward pressure on state discretion tend to disable potential resistance. As is clear from § 1373's plain operation, as well as its legislative history, the whole point was to ensure local cooperation.[250] The sole purpose is to attenuate the states' right of refusal, by placing it where it is least likely to be exercised. This presents real problems under the kind of purposive thinking espoused by seven Justices in *NFIB*.[251]

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implementing the Affordable Care Act bear a striking resemblance to the equivalent tendency in immigration enforcement. *Compare id.* at 59–64, *with supra* notes 133–45 and accompanying text.

247. *See* Fahey, *supra* note 19, at 1573. *But see id.* at 1603–08 (explaining how federal programs sometimes purport to grant state actors ultra vires authority, placing the onus on other state actors to correct the problem).

248. Even Hills, who has argued for a "presumption of institutional autonomy"—a presumption that ambiguous state law does not restrict state or local institutions from exercising federally-conferred authority—is troubled by the prospect that a state legislature, speaking clearly, "should not be able to veto . . . federal-local cooperation." Roderick M. Hills, Jr., *Dissecting the States: The Use of Federal Law To Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1249–50, 1271, 1278, 1285 (1999).

249. *See supra* notes 218–23 and accompanying text (explaining the relevance of purpose).

250. *See* Report of the Senate Judiciary Committee, S. REP. NO. 104-249, at 19–20 (1996) ("The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation."); H.R. REP. NO. 104-725, at 383 (1996) (Conf. Rep.), *as reprinted in* 1996 U.S.C.C.A.N. 2183, 2649 ("This provision is designed to prevent any State or local law, ordinance, executive order, policy, constitutional provision, or decision of any Federal or State court that prohibits or in any way restricts any communication between State and local officials and the INS.").

251. *See supra* Section II.D (describing the right of refusal's purposive dimension). The anti-disclosure regulation, 8 C.F.R. § 236.6 (2016), might pose similar problems if used broadly to obstruct state and local political processes for supervising enforcement decisions. *Cf.* Grant Martinez, Comment, *Indefinite Detention of Immigrant Information: Federal and State Overreaching in the Interpretation of 8 C.F.R. § 236.6*, 120 YALE L.J. 667 (2010) (explaining the importance of information for supervision).

If § 1373 is unconstitutional, then the Second Circuit's opinion upholding it, *City of New York v. United States*,[252] was wrongly decided. The *City of New York* opinion rested on the second route to legality: the double-negative form. But it did not confront the restructuring effect or improper purpose outlined above. Instead, the bulk of the opinion balanced federal and local interests. Absent local participation, the court worried, "some federal programs may fail or fall short of their goals."[253] States, meanwhile, had little interest in "passive resistance that frustrates federal programs."[254] There are several flaws in this analysis. For one thing, it is not clear that such free-form balancing was even appropriate, because § 1373 is not generally applicable; the court did not explain why a balancing framework governed.[255] In applying that framework, the court gave the city's police-power interest surprisingly short shrift, dismissing it as mere obstructionism. In fact, it reserved the possibility that more "legitimate municipal functions" might win out.[256] That is precisely the picking-and-choosing of favored government functions the Supreme Court largely abandoned in *Garcia*.[257] Nor did the court explain why the public-safety rationales for New York City's policy did not fall squarely within states' core police-power interests.

Most importantly, though, the Court has since rejected the Second Circuit's central concern for harmony in the implementation of federal programs. "[P]assive resistance that frustrates federal programs" is *exactly* the option the Supreme Court has protected in its commandeering and coercion cases.[258] State

252. 179 F.3d 29 (2d Cir. 1999).

253. *Id.* at 35.

254. *Id.* This conclusion was apparently unaffected by the court's acknowledgment that the "obtaining of pertinent information . . . may in some cases be difficult or impossible if some expectation of privacy is not preserved." *Id.* at 36.

255. *See* Printz v. United States, 521 U.S. 898, 932 (1997) (noting that federal-local balance of interests "*might* be relevant if we were evaluating whether the incidental application to the States of a federal law of *generally applicability* excessively interfered with the functioning of state governments" (emphasis in original)). New York City raised this issue, though not until its reply brief. *See* Appellants' Reply Brief at Part I.b, City of New York v. United States, 1998 WL 34099905 (2d Cir. Jan. 9, 1998) (No. 97-6182).

256. *City of New York*, 179 F.3d at 37.

257. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985) (explaining that attempts to decide which state functions are most important "inevitably invite[s] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes"). *But see* Gregory v. Ashcroft, 501 U.S. 452 (1991) (reviving "traditional state function" analysis to a degree, but not as a matter of free-form interest balancing, and only as a matter of statutory interpretation).

258. *City of New York*, 179 F.3d at 35; *see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604–05 (2012) (recognizing a state's "'prerogative' to reject Congress's desired policy, 'not merely in theory but in fact'" (quoting South Dakota v. Dole, 483 U.S. 203, 211–12 (1987))). In *Printz*, too, it was clear that the federal government

and local governments who choose not to help administer a federal program are under no obligation to nonetheless offer their employees' "voluntary cooperation."[259] Put simply, the Supreme Court has embraced a more competitive model of federal-state relations than the *City of New York* opinion espoused.[260]

The Court has also expressed some pointed skepticism about federal power to unilaterally reallocate state authority. In *Lopez*, Justice Kennedy famously warned that it would violate "the etiquette of federalism" for the federal government to direct a state "to organize its governmental functions in a certain way."[261] More recently, the Court noted that "there are limits on the Federal Government's power to affect the internal operations of a State."[262] Once again, Justice Kennedy doubted that the federal government could demand "far-reaching changes with respect to [a state's] governmental structure or its basic

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could not have implemented the background check system during the interim period on its own. 521 U.S. at 902.

259. *City of New York*, 179 F.3d at 34–35. The court made much of the fact that the City was not just declining to affirmatively participate in immigration enforcement, it was blocking its employees' "voluntary" participation. *Id.* But a government that adopts a policy can presumably make its employees follow that policy.

260. Beyond the bare observation that local participation was useful to the federal government, the court cited two additional reasons to favor cooperation. First, some states defied federal law in the wake of *Brown v. Board of Education*, 347 U.S. 483 (1954), forcing unnecessary resort to the courts; second, the Supremacy Clause requires that states not frustrate federal law. *City of New York*, 179 F.3d at 35. Of course local governments cannot disobey federal law. But that axiom does not speak to whether any given federal law is constitutional in the first place. The Supremacy Clause did not rescue the Brady Act provision in *Printz*.

261. United States v. Lopez, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). Granted, that can happen under a *Garcia*-type state-regulating statute. But those statutes do not carry a right of refusal. Here, by construction, the question is whether that can happen as to the enforcement of individual-regulating federal law.

262. Va. Office for Prot. & Advocacy v. Stewart (VOPA), 563 U.S. 247, 260 (2011) (citing *Printz*, 521 U.S. 898, and Coyle v. Smith, 221 U.S. 559, 579 (1911)); *see id.* at 261 (opining that a state agency's authority to sue other state officials, while not constrained by the Eleventh Amendment, still "cannot exist without the consent of the State that created the agency and *defined its powers*" (emphasis added)). It is no answer that localities are not state actors for purposes of the Eleventh Amendment. The Supreme Court has rejected a federal-state distinction in the Tenth Amendment context, where it has held that local actors *are* state actors. *See Printz*, 521 U.S. at 930–31, 931 n.15. Besides, Eleventh Amendment jurisprudence is riddled with irregularities that have little purchase outside of that context. *Compare, e.g.*, *VOPA*, 563 U.S. at 259 (distinguishing between a suit "against an unconsenting State, rather than against its officers"), *with Printz*, 521 U.S. at 931 ("To say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance.").

policies of governance," even as a condition of federal funds.[263] Thus, if Congress cannot deny states their right of refusal, it is unlikely that Congress can formally restrict who gets to exercise it.[264] A court applying the right of refusal would therefore need to part ways with the Second Circuit.

C. Local Spending Threats

Federal-local spending programs are another set of inducement strategies for maintaining integrated immigration enforcement. They raise a number of doctrinal and theoretical questions about the place of states—and their constituent parts—in our constitutional order. Should multiple spending conditions be analyzed for coercion individually, or in the aggregate? Does the anti-coercion rule protect localities, or just states? Which pots of funding can Congress, in fact, threaten? This Section begins to unpack these questions, which are pressing far beyond immigration. From education to transportation to housing, federal-local grants shape the policies that govern people's daily lives.

1. The Threatened Programs

Most of the local-enforcement proposals that have emerged since the summer of 2015 would cut off some combination of four different spending programs. Before discussing the constitutional questions they raise, I will briefly describe each program.

The State Criminal Alien Assistance Program reimburses state and local jails and prisons for some non-citizen detention costs.[265] SCAAP funds already come with one condition: they "may be used only for correctional purposes."[266] Payouts have varied between $200 million and $600 million per year since the 1995, though the program has never covered more than one quarter of costs na-

263. *VOPA*, 563 U.S. at 265 (Kennedy, J., concurring); *see also id.* at 263 (recognizing "the State's important sovereign interest in using its own courts to control the distribution of power among its own agents").

264. Hills has argued that this vision of "state supremacy" is less grounded in case law than commonly assumed. Hills, *supra* note 248, at 1207–16. *Compare id.* at 1210–12, *with supra* Section II.D, *supra* note 262, *and infra* notes 286–89 and accompanying text. Regardless, § 1373 goes beyond the disaggregation of states from localities that is the focus of his study. It disaggregates all state actors from all others. Read literally, it would leave each and every state and local employee free to weigh the pros and cons of participating in immigration enforcement for herself.

265. 8 U.S.C. § 1231(i)(3) (2012). SCAAP pays for detentions of four consecutive days or more, but only for "undocumented criminal aliens," defined as those convicted of a felony or at least two misdemeanors, and who did not have legal status at the time of their arrest.

266. *Id.* § 1231(i)(6).

tionwide.[267] Probably because of the consecutive-four-day requirement, the majority of SCAAP funding goes to states, whose prisons tend to house those serving longer and more serious sentences.[268]

The Edward Byrne Memorial Justice Assistance Grant (JAG) program is "the leading source of federal justice funding to state and local jurisdictions."[269] It gives states and localities money for use throughout the criminal justice system, for policing, adjudication, incarceration, technology, drug treatment, and education.[270] The program disburses block grants according to a statutory formula,[271] with few conditions or restrictions. Since 2005, Congress has generally appropriated between $400 and $600 million for the JAG program.[272] In fiscal year 2015—the most recent year for which data are available—the total fell to $246.5 million.[273] Of course, the total amount received by each state and locality varies dramatically. California received $17 million in 2015, while Virginia received $3.2 million.[274] Wayne County, Michigan, which includes Detroit, re-

267. *See* Ann Morse, *The State Criminal Alien Assistance Program (SCAAP)*, NAT'L CONF. ST. LEGISLATURES (Apr. 13, 2013), http://www.ncsl.org/research/immigration/state-criminal-alien-assistance-program.aspx [http://perma.cc/K8VV-HS4J].

268. *See Byrne JAG, COPS and SCAAP Grant Awards by State – FY12*, NAT'L CRIM. JUST. ASS'N (2012), http://www.ncja.org/sites/default/files/documents/NCJA-Byrne-JAG-COPS-SCAAP-awards-by-state-and-locals-FY12_0.pdf [http://perma.cc/S8KW-GDJQ].

269. Bureau of Justice Assistance, *Edward Byrne Justice Assistance Grant (JAG) Program Fact Sheet*, U.S. DEP'T JUST. (Jan. 7, 2016), http://www.bja.gov/Publications/JAG_Fact_Sheet.pdf [http://perma.cc/8WCT-U9UB].

270. *See* Bureau of Justice Assistance, *Edward Byrne Memorial Justice Assistance Grant (JAG) Program: FY 2015 Local Solicitation*, U.S. DEP'T JUST. (May 12, 2015), http://www.bja.gov/Funding/15JAGLocalSol.pdf [http://perma.cc/H9QF-MQBP].

271. 42 U.S.C. § 3755 (2012).

272. *See* NATHAN JAMES, CONG. RESEARCH SERV., RS22416, EDWARD BYRNE MEMORIAL JUSTICE ASSISTANCE GRANT (JAG) PROGRAM 6 (2013), http://fas.org/sgp/crs/misc/RS22416.pdf [http://perma.cc/WW46-9NXB].

273. *See* Bureau of Justice Assistance, *Awards Made for Solicitation: BJA FY 15 Edward Byrne Memorial Justice Assistance Grant (JAG) Program – State Solicitation*, U.S. DEP'T JUST. (Nov. 13, 2015) [hereinafter State JAG Grants 2015], http://grants.ojp.usdoj.gov:85/SelectorServer/awards/pdf/solicitation/BJA%20FY%2015%20Edward%20Byrne%20Memorial%20Justice%20Assistance%20Grant%20(JAG)%20Program%20%20State%20Solicitation [http://perma.cc/9B2C-PGPU] (reporting that the program dispersed $168,121,634 to states in FY 2015); Bureau of Justice Assistance, *Awards Made for Solicitation: BJA FY 15 Edward Byrne Memorial Justice Assistance Grant (JAG) Program – Local Solicitation*, U.S. DEP'T JUST. (Nov. 13, 2015), http://grants.ojp.usdoj.gov:85/SelectorServer/awards/pdf/solicitation/BJA%20FY%2015%20Edward%20Byrne%20Memorial%20Justice%20Assistance%20Grant%20(JAG)%20Program%20-%20Local%20Solicitation [http://perma.cc/3H4W-XHYU] (reporting that the program dispersed $78,331,338 to localities in FY 2015).

274. *See* State JAG Grants 2015, *supra* note 273.

ceived $1.3 million; most cities and counties received less than $50,000.[275] Slightly over half of these funds are used for policing activities.[276]

The Community Oriented Policing Services (COPS) program also funds a variety of state, local, and tribal criminal functions, especially the hiring of law enforcement officers.[277] It was created by the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA).[278] While it is hard to quantify exactly how many police officers were hired *because of* COPS, it appears that the program has funded upwards of 100,000 officers since its inception.[279] COPS funding has generally fluctuated between $400 million and $1 billion over the last decade.[280] Unlike in Byrne-JAG, all COPS grants go directly to localities, not states.[281]

The Community Development Block Grant (CDBG) program is administered by the Department of Housing and Urban Development. It funds a wide range of local government expenditures, including affordable housing, small business development, disaster recovery, and other programs to help low-income communities; it does not fund law enforcement.[282] As its name suggests, the program provides block grants, which give recipients wide latitude in determining how to spend the funds.[283] The CDBG program is bigger than any of

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275. *Id.*

276. Bureau of Justice Assistance, *Grant Activity Report: Justice Assistance Grant (JAG) Program, April 2012–March 2013*, U.S. DEP'T JUST. 1, 2 fig.2 (2013), http://www.bja.gov/Publications/JAG_LE_Grant_Activity_03-13.pdf [http://perma.cc/XB9B-MWCQ].

277. *See generally* NATHAN JAMES, CONG. RESEARCH SERV., R40709, COMMUNITY ORIENTED POLICING SERVICES (COPS): CURRENT LEGISLATIVE ISSUES 1 (2014) [hereinafter JAMES, *COPS II*], http://www.hsdl.org/?view&did=750104 [http://perma.cc/QV82-NLPX] (describing the program).

278. Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. § 3796dd (2012)).

279. *See* JAMES, *COPS II*, *supra* note 277, at 10–13 (explaining the competing claims about the precise number of police officers paid through COPS funds). In 2011, the COPS Office claimed that, as of 2004, the program had led to the hiring of over 117,000 new officers. NATHAN JAMES, CONG. RESEARCH SERV., RL3308, COMMUNITY ORIENTED POLICING SERVICES (COPS): BACKGROUND, LEGISLATION, AND FUNDING 1 & n.5 (2011) [hereinafter JAMES, *COPS I*], http://fas.org/sgp/crs/misc/RL33308.pdf [http://perma.cc/L4BY-2NL6].

280. JAMES, *COPS I*, *supra* note 279, at 4.

281. *See Byrne JAG, COPS and SCAAP Grant Awards by State*, *supra* note 268.

282. *See Community Development Block Grant Program – CDBG*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/communitydevelopment/programs [http://perma.cc/8GKV-RMTR]. The program was first authorized by the Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633-2 (codified at 42 U.S.C. §§ 5301 *et seq.* (2012)).

283. *See* EUGENE BOYD, CONG. RESEARCH SERV., R43520, COMMUNITY DEVELOPMENT BLOCK GRANTS AND RELATED PROGRAMS: A PRIMER 1–2 (Apr. 30, 2014), http://www.nationalaglawcenter.org/wp-content/uploads/assets/crs/R43520.pdf [http://

the law enforcement programs. Its appropriation for fiscal year 2015 was over $3 billion.[284]

2. Cross-Cutting Conditions

Most of the local-enforcement bills would withhold some combination of the four programs discussed above from localities that adopt anti-detainer or anti-notification policies. This situation is different from the Supreme Court's canonical Spending Clause cases—*Pennhurst*, *Dole*, *NFIB*—which involved one condition attached to one grant. When a new condition cuts across multiple programs, should a court review each program in isolation, or the whole condition? What happens when the condition is coercive in the aggregate but non-coercive in particular applications?

Those questions are simplified a bit by the fact that conditions that direct the use of funds definitionally cannot coerce. These conditions effectively define the scope of the program itself, as I explained in Section II.C. By contrast, conditions that "are properly viewed as a means of pressuring the States to accept policy changes"[285] can and do coerce. These must therefore be aggregated. While there may be some appeal to the notion that courts faced with coercive cross-cutting conditions could pare down the threat to a non-coercive size, in practice, there would be no way to choose which ones to jettison. Disaggregation might also lead courts into overly fine distinctions of where, exactly, threats become coercive—distinctions the Court has clearly sought to avoid with its know-it-when-you-see-it approach in *NFIB*, *Dole*, and *Steward Machine*.

This yields a fairly straightforward update to the Spending Clause doctrine outlined in Section II.C: a court facing a challenge to a cross-cutting condition, like those presented in the local-enforcement bills, should disregard the applications that direct the use of funds, strike down non-germane applications, and then analyze the remaining applications in the aggregate.

3. Local Grant Programs

Another open question concerns the impact of *NFIB* on federal-local spending programs. All the grants in the local-enforcement bills—along with many other federal grants—go to local governments and agencies, either directly or through the states. To judge these inducement approaches, we must know whether and how the anti-coercion rule applies to local governments.

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perma.cc/G7BH-7A7V]. For a discussion of the difference between block grants and their more tailored counterpart, categorical grants, see ROBERT JAY DILGER & EUGENE BOYD, CONG. RESEARCH SERV., R40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES (2014), http://fas.org/sgp/crs/misc/R40486.pdf [http://perma.cc/WB2H-XPH6].

284. *See CPD Appropriations Budget*, U.S. DEP'T HOUSING & URB. DEV., http://portal.hud.gov/hudportal/HUD?src=/program_offices/comm_planning/about/budget/ [http://perma.cc/299Q-NMH7].

285. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2603–04 (2012).

On the "whether" question, there are good reasons to think that the answer is yes. We know, from *Printz*, that the federal government may not commandeer local officials. As the Court put it, referring to county sheriffs, "[t]o say that the Federal Government cannot control the State, but can control all of its officers, is to say nothing of significance."[286] The Court rejected the dissent's reliance on the fact that sovereign immunity did not protect local officials, because the Eleventh Amendment's state-local distinction was "peculiar" to its context.[287] From a formal standpoint, the right of refusal arises under the Tenth Amendment, which means that there is no doctrinal reason to exclude local actors from its ambit.[288] The same is true from a functional standpoint: if Congress cannot mandate local regulatory action, why should it be able to *effectively* force that action by threatening to cripple local finances?[289]

The "how" question is more difficult, because there are some meaningful differences between state and local governments. Local governments have much smaller budgets. They regulate different kinds of activity. There is plenty of overlap, but on the whole, local governments handle different policy areas, and law enforcement takes up a much bigger share.[290] That difference matters, be-

286. Printz v. United States, 521 U.S. 898, 930–31, 931 n.15 (1997).

287. *Id.*; *see id.* at 955 n.16, 965 (Stevens, J., dissenting). For more on why the Eleventh Amendment analogy is unhelpful, see *supra* note 262. In its previous encounters with congressional power to regulate the states, the Court had similarly either said outright, or appeared to assume, that a state's federalism protections extended to its subdivisions. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); Nat'l League of Cities v. Usery, 426 U.S. 833, 855 n.20 (1976).

288. Also, many ostensibly local actors are actually treated as state officials, for purposes of both state and federal law. For instance, in many states, district attorneys and sheriffs are considered state officials and answer directly to the state attorney general. *E.g.*, CAL. CONST. art. V, § 13; Hicks v. Bd. of Supervisors, 69 Cal. App. 3d 228, 242 (Ct. App. 1977) (explaining that under the California Constitution, a county district attorney "acts by the authority and in the name of the people of the state"). The same is true for sovereign immunity purposes under the Eleventh Amendment. *See, e.g.*, McMillan v. Monroe City, 520 U.S. 781, 783 (1997) ("We hold that, as to the actions at issue here, Sheriff Tate represents the State of Alabama and is therefore not a county policymaker.").

289. For a different take, see Eloise Pasachoff, *Conditional Spending After* NFIB v. Sebelius*: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 652–55 (2013). Professor Pasachoff would not apply the anti-coercion rule to localities, primarily because the Court considered states the repositories of sovereignty in *NFIB*, and because such application would raise substantial doctrinal challenges. I do not dispute the second point, as this Section makes clear, though I do think the right of refusal winnows the analysis down to the coerced actor's own budget. As to the first, *NFIB* understood coercion to cause the exact same harm as commandeering, which localities are clearly protected from. If coercion is simply commandeering's functional counterpart, as Section II.D argues, then, at least in principal, neither should be available to compel local officials to enforce federal law.

290. *See* Rachel A. Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 948 & n.322 (2015) ("Overwhelmingly, police department funds come

cause it means that local governments—and especially sheriffs and police chiefs—might have a different point at which a threat feels like "a gun to the head."[291]

Even if sensible in the abstract, then protecting local government from coercive spending threats could pose a number of practical problems. One might object that there are big differences across local budgets,[292] and so a condition that coerces one might barely affect another; how would courts decide whose budget percentages "count"? One might also object that a percentage-based analysis might encourage localities, and their state patrons, to reduce their own funding in response to federal grants;[293] the less of their own money they spent, the more likely they would be to "lock in" their federal funds as a constitutional matter. The problem with both of these objections is that they are equally true of conditions that coerce *states*, and are thus insufficient to distinguish *NFIB*. They still could have some role to play in coercion doctrine as applied to both levels of government: the first objection might counsel against allowing as-applied challenges; the second might weigh in favor of reserving the rule for extreme situations.[294] But these are criticisms of the rule the Court has already adopted, not any future application.

A more problematic counter is that the state, with its larger budget, could simply make up for post-cutoff shortfalls in local budgets. After all, the argument would go, states are the real source of autonomy, and the state is not coerced by a drop-in-the-bucket removal of federal funds from one of its subdivisions. This is an argument not that the federal government should be *allowed* to coerce local governments, but that, in practice, it will not, because states will have the ability, if they want, to restore their officers' and subdivisions' ability to turn down federal programs.

This is ultimately an empirical question with no easy answers. It is certainly *possible* that state governments are arranged in such a way that they can and will selectively restore this kind of lost funding. But in many states, there are real divisions between state and local fiscal authority, with some services funded mostly or completely at the local level. A local official facing a large shortfall could

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from local governments, and policing consumes a large part of municipal budgets.").

291. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).

292. The percentage of county budgets devoted to law enforcement varies dramatically. For instance, Cococino County, Arizona spent almost a third of its 2007 budget on public safety and corrections. *See NACo County Explorer*, NAT'L ASS'N COUNTIES, http://cic.naco.org/index.html?dset=Justice%20%26%20Public%20Safety%20Expenditures&ind=Total%20County [http://perma.cc/VGF8-8U4H]. Los Angeles County spent about a quarter. *Id.* Hamilton County, New York spent just under thirteen percent. *Id.* Lauderdale County, Tennessee spent under ten percent. *Id.*

293. There are indications that this already happens in practice. *See* Harmon, *supra* note 290, at 952; Hills, *supra* note 248, at 1202.

294. *See NFIB*, 132 S. Ct. at 2662 (joint dissent) ("[C]ourts should not conclude that legislation is unconstitutional on [coercion] ground[s] unless the coercive nature of an offer is unmistakably clear.").

not expect the state to ride to his rescue absent an alteration to the state's fiscal structure, which may be set by statute or constitution.[295] In other words, it is equally possible that, in practice, no law enforcement chief would be free to refuse a condition attached to all, or most, pre-existing federal funds. If that is true, then giving the federal government free reign to threaten those funds might result in the practical ability to direct all kinds of affirmative police action—an outcome that seems in tension with *NFIB*'s insistence that we look to how things will play out on the ground.

The resolution of this issue will turn on a number of factors that are hard to predict: how courts think intrastate relations actually work; how "realistically" they apply *NFIB*; how solicitous they are of local government's ability to function as an alternative site of power, independent of the state.[296] It might also require a reexamination of exactly *why* local actors may not be commandeered. The majority in *Printz* did not explain in detail. If it is because they speak for the state, in some constitutional sense, then the Tenth Amendment might protect their right of refusal quite comprehensively. But if it is because the central state government—as the "real" site of autonomy—cannot control their behavior when they are commandeered, then coercion might stand on a different footing. In other words, we need to know exactly who "the state" is.

Note, however, that these uncertainties only attach at the coercion stage of the Spending Clause analysis. Directing conditions are still per se constitutional, and non-germane conditions are still per se unconstitutional. Those rules are enough to assess at least some of the proposed spending cut-offs in the local-enforcement bills.

4. Applying the Right of Refusal

At the outset, both notification and detainer conditions appear to direct the use of SCAAP funds. Funds granted under SCAAP are specifically tied to the incarceration of deportable immigrants, and they can only be used for correctional purposes.[297] It is true that the program only funds a fraction of actual detention costs.[298] But in many programs, Congress imposes conditions on activities it funds only a portion of. Assuming the Court, in *NFIB*, did not intend to upend decades of cooperative regulatory programs, the use of funds must not be analyzed at such a low level of generality.[299] In the terms of my taxonomy, these conditions would simply change SCAAP from an offer to a trade: Con-

295. *See* Christopher Hoene & Michael A. Pagano, *Research Report on America's Cities: Cities & State Fiscal Structure*, NAT'L LEAGUE CITIES 11, 14 (2015), http://www.nlc.org/documents/Find%20City%20Solutions/Research%20Innovation/Finance/cities-state-fiscal-structure-2008-rpt.pdf [http://perma.cc/5U7C-BVAE].

296. For arguments that they should be, see Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); and Hills, *supra* note 124.

297. *See* 8 U.S.C. § 1231(i)(6) (2012).

298. *See supra* note 265 and accompanying text (explaining SCAAP funding formula).

299. *See* Bagenstos, *supra* note 180, at 912–16.

gress would essentially be saying that it will help pay for detention, but only if part of the funds are used to report on and extend that detention in certain cases.[300]

Things are less clear for the other programs, most of which do not fund jails, prisons, or anything to do with immigrants. For instance, the officers whose salaries are funded by the COPS program are almost never the ones receiving detainer and notification requests. Then again, as I argued in Section III.A, notification and detainers do not simply request one quick email from one jail official. They enlist the entire law enforcement process, from investigation to arrest to detention. Thus, a more plausible narrative might be that federal funds for, say, officer salaries can only be used to fund officers whose police-work is subject to later reporting. Interestingly, this pits the legality of mandatory reporting against the legality of the proposed funding cut-offs. The more notification co-opts the whole law enforcement process, the less viable it is as a mandate, but the more viable it is as a condition on funding for earlier stages of that process. That said, I doubt a court would dilute the inquiry this far. A requirement that jail officials honor detainers hardly seems to direct the use of funds that pay for new squad cars, or a patrol officer's salary, or a prosecutor's salary. This means that threats to cut off COPS, JAG, and other law enforcement grants cannot be per se constitutional on those grounds. Neither can the Community Development Block Grant program, whose funds have little to do with law enforcement, much less immigration.

On the other hand, most of the conditions are probably germane to the local law enforcement funds. The local-enforcement proposals, in their proponents' telling, are designed to improve public safety by facilitating the removal of non-citizen criminals. That purpose is certainly germane to law enforcement grants under a deferential analysis.[301] This is not to endorse the proponents' assumption that local participation in immigration enforcement improves public safety; indeed, many law enforcement officials, immigrant communities, state and local governments, and scholars dispute it.[302] But a deferential germaneness analysis requires crediting the federal government's plausible policy assumptions.

The same cannot be said, however, for Community Development Block Grants, which fund local activities like affordable housing and small business development. If immigration enforcement were related to that purpose, it would obliterate the germaneness requirement, which every member of the Supreme Court has recently re-endorsed.[303] This application of the condition therefore fails under *Dole*. The same is true, necessarily, for the recent proposals

300. *See supra* Sections I.B.2, I.B.3 (discussing offers and trades). The Department of Justice's Office of Justice Programs, which disburses local law enforcement grants, has recently interpreted the SCAAP and JAG grants to *already* be conditioned on compliance with 8 U.S.C. § 1373. *See supra* note 113.

301. *See supra* Section II.C (explaining that the germaneness analysis is highly deferential).

302. *See supra* note 234.

303. *See supra* note 182.

that would reach even further to cut off *all* funding to local governments.[304] Federal grants fund local projects as diverse as roads, schools, and hospitals. While the germaneness requirement may be underdeveloped, it does still exist. Such an indiscriminate threat, leveled for no purpose other than to undermine the right of refusal, seems like exactly the kind of spending condition the germaneness requirement would prevent.

That leaves COPS and JAG. If the anti-coercion rule extends to local institutions, threats to these programs would have to be considered jointly. As I argued in Section III.C.3, it is difficult to know how that analysis should play out—whose budget to consider, for instance—without answers to some deeper questions about local government's role in federalism. There is also a further obstacle to assessing these threats' legality, which is that macrodata on the percentages of local budgets funded by specific federal law enforcement grants does not yet exist.[305] Assembling that dataset is beyond the scope of this Article, but it is an essential project for future study, both for answering this particular question, and for examining the larger issue of how much leverage, in practice, the federal government has over local policing practices. For now, it is enough to say that the right of refusal probably protects local governments, not just states, and that threats to cut off non-law-enforcement funds probably fail the *Dole* test.

IV. Normative Debates About Federalism and Inducement

This Part moves beyond the case law to explore immigration enforcement's intersection with scholarly claims about cooperative federalism. Since *New York*, debate has simmered over the wisdom of protecting states from commandeering. Now, in the wake of *NFIB*, that question has purchase across a number of federal-state interactions. The new question is where, and to what degree, courts should protect the right of refusal.

A satisfying answer to that question must, of course, refer to the values served by federalism. We cannot know if a rule makes sense without some normative baseline about the ends the rule is meant to serve. Courts and scholars have identified a long list of values associated with federalism. My goal in this Part is not to balance their relative importance. It is simply to show how immi-

304. *See supra* note 114.

305. *See* Harmon, *supra* note 290, at 937–38 ("It is unclear how much of [local law enforcement] spending comes from the federal government, since there is no authoritative list of federal government grant programs that seek to promote public safety, and the programs vary significantly from year to year."). That said, it is clear that all federal programs combined constitute an enormous share of local government budgets. *See, e.g.*, Aaron Elstein, *Trump's Attack on 'Sanctuary Cities' Could Cost New York Dearly*, CRAIN'S N.Y. BUS. (Sept. 1, 2016), http://www.crainsnewyork.com/article/20160901/POLITICS/160909988/donald-trumps-attack-on-sanctuary-cities-could-cost-new-york-dearly [http://perma.cc/QR93-YNT4]. As a result, the recent threats to withhold *all* federal funding most likely violate the coercion prohibition, in addition to the germaneness requirement. *See supra* note 114 and accompanying text (describing those threats).

gration enforcement speaks to some recurring themes in the ongoing conversation about how constitutional doctrine serves different federalism values. Because federalism scholars have tended not to closely engage with immigration, it has yet to leave its full mark on these broader debates. This Part begins that project. I explore the right of refusal's impact on state and local autonomy, subfederal participation in national dialogue, individual liberty, and accountability.[306]

A. State and Local Autonomy

Many critics of the anti-commandeering doctrine have argued that states' regulatory authority is actually enhanced, not constricted, by commandeering. The story goes that by carrying out federal regulatory programs, states retain power over implementation decisions, instead of being sidelined altogether by federal regulators.[307] This insight conceives of state autonomy not as a negative right—the hermit's prerogative to be left alone—but rather the positive capability to project influence, to make active decisions.[308] On this account, preemption is the real danger to autonomy because it kicks states out of the game altogether.[309] If that is true, we might welcome mandated participation and instead focus on narrowing the scope of preemption.

For this account to be accurate, however, there must be some residual choice left for commandeered officials to make. A servant assigned only a rote task cannot shape broader policy, and might not even wield influence at the margins. In other words, not all commandeering is created equal. An open-ended command to address a certain problem, as in *New York*, might leave the regulator with real sway over the details of implementation. But a narrow, discretion-less directive leaves no influence over any policy choices.

That is the case with immigration detainers and notification requests. There are no choices left to make when a jail receives a directive to hold a specific person for a specific amount of time, or an order to provide a certain piece of information. There is no leeway in "determin[ing] the ways and means of complying with [the] overriding requisition."[310] State and local governments thus have little autonomy or influence to gain from this kind of conscription.

Nor should we worry about the other half of the equation—the specter of preemption—when it comes to the police. The federal government cannot preempt local policing the way it can preempt, say, mine regulation (*Hodel*) or

306. For an analysis of federalism values in the context of immigration preemption, see Huntington, *supra* note 15, at 830–38.

307. *See, e.g.*, Printz v. United States, 521 U.S. 898, 945 (1997) (Stevens, J., dissenting); Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937); Siegel, *supra* note 208, at 1634.

308. Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 166 (1969); *see also* AMARTYA SEN, ON THE IDEA OF JUSTICE 231 (2009) (conceiving of liberty as positive capability, not simply freedom from restraint); David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 383 (2001) (invoking positive autonomy in a governmental context).

309. *See* FERC v. Mississippi, 456 U.S. 742, 765 n.29 (1982).

310. *Printz*, 521 U.S. at 945 (Stevens, J., dissenting).

utility ratemaking (*FERC*). Neither could the federal government use its own agents to achieve the same effect. The cost would be orders of magnitude higher than is currently devoted to all federal law enforcement combined.[311] And, as explained above, the federal government lacks authority to prohibit, and thus to police for, the kinds of criminal-law violations that are currently the main entry point into the immigration system.[312] The advantage of local police, from the federal government's standpoint, is not just their ubiquity, but the specific nature of their authority—authority that no federal police force can ever have.

This does not mean that arguments connecting compelled participation to autonomy are wrong, it just suggests some normative granularity. While forced participation in national governance might often increase the influence of subfederal legislatures and administrative agencies—as with large spending programs like Medicaid[313]—the script is flipped when it comes to the police, and possibly other enforcement actors too. The question of whether that difference should spell doctrinal granularity will have to await future work.[314]

B. Voice and Negotiation

Federalism scholars have long debated whether integration or independence makes states more likely to speak up—and be heard—on questions of federal policy. Many have noted these potential "discursive benefits of structure," to borrow Professor Heather Gerken's phrase.[315] Scholars have split, however, over how best to foster that kind of participation. Some have argued that exit options discourage voice, by making it too easy to opt out of federal programs on procedural grounds.[316] Others have responded that the exit option is precise-

311. As of 2008, state and local officers with general arrest powers outnumbered all federal law enforcement agents by a factor of almost seven. They outnumbered current ICE employees (including prosecutors) thirty-seven to one. *See Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about [http://perma.cc/BT2G-R6H6]; Brian A. Reaves, *Federal Law Enforcement Officers, 2008*, U.S. DEP'T JUST. 1 (June 2012), http://www.bjs.gov/content/pub/pdf/fleo08.pdf [http://perma.cc/ZWX6-MTLC]; Brian A. Reaves, *Census of State and Local Law Enforcement Agencies, 2008*, U.S. DEP'T JUST. 1 (July 2011), http://www.bjs.gov/content/pub/pdf/cslleao8.pdf [http://perma.cc/5SV9-2L8E].

312. *See, e.g.*, Bond v. United States, 134 S. Ct. 2077, 2086 (2014); United States v. Morrison, 529 U.S. 598, 618 (2000).

313. *See* Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749, 1766 (2013).

314. *See also* Siegel, *supra* note 208, at 1635 (arguing for different levels of scrutiny for commandeering based on the availability of alternatives).

315. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1894 (2014).

316. *See* Bulman-Pozen & Gerken, *supra* note 19, at 1295–1301 (arguing that the ability to opt out "may decrease, even eliminate, [states'] incentive to reshape or challenge federal policy," whereas "having to enforce federal law [] may drive states to contest such law on the merits").

ly what makes voice credible—that without the ability to opt out, subfederal aid will be taken for granted.[317]

Immigration enforcement adds one important data point to this discussion. Integration has produced wide-ranging vertical friction, allowing communities across the country to weigh in on national policy—a capability they might not have had without federal reliance on their police forces. In the last decade, almost every sheriff, police chief, mayor, and governor has had to take a position on immigration policy. Such diffuse and visible debate is almost inconceivable without the very real prospect of federal imposition on local services. It has also produced some tangible federal policy changes. After extensive state and local resistance, DHS acceded to the particular demand for fewer detainers, and more generally, agreed to restructure some of its enforcement practices in line with the substantive demands of its subfederal counterparties.[318]

It is crucial to note, though, that constitutional protection from forced participation has been essential to this influence. State and local governments have affected federal policy's formation (who gets prioritized) and implementation (who gets deported), but only by turning down detainer and notification requests when they object. Where law enforcement officials have interpreted detainers to be mandatory, they have been anything but vocal in their opposition.[319] This is the lesson of inducement by downward pressure: it puts decisions in the hands of those who are least likely to challenge federal policy, especially if it is binding.[320] Conversely, the ability to opt out on procedural grounds has not prevented sheriffs and governors from challenging the merits of that policy. Many have spoken up about both the number and distribution of people being deported. In this case, a hard right of refusal has enabled, not deflated, a robust national conversation about the merits of federal policy.

C. Policing and Liberty

Since the Court started striking down statutes on federalism grounds, the federalism value it has most prized is individual liberty. This line of thinking has been around for some time. In Federalist No. 51, James Madison famously described the Constitution's federal system as creating a "double security" for "the rights of the people."[321] Alexander Hamilton similarly described federalism as

317. *See* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 704 (2001) (citing ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 36–43 (1970)).

318. *See* Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2016) (explaining DAPA as an attempt to formalize the exercise of discretion); Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665 (2016).

319. *See supra* notes 137–42 and accompanying text.

320. *See supra* Section I.C.

321. THE FEDERALIST NOS. 51, 323 (James Madison).

allowing each level of government "to check the usurpations" of the other.[322] These days, it is rare to see a federalism case that does not invoke the notion of two-tiered government protecting liberty.[323]

And yet, in practice, the connection between federalism and liberty can be a bit abstract. Does separate-spheres federalism *always*, necessarily, protect individual liberty? Many of the areas in which the Court has most aggressively enforced federalism limitations involve federal attempts to protect individual rights against states.[324] We have no way to empirically judge what effect this boundary-guarding has on individual rights. At times, then, it can be hard to grasp how diffusion actually protects anyone's liberty.

Things get less abstract when you consider the coercive power of the police. In their daily decisions, they are entrusted with balancing public order and private freedom. Those decisions determine the "effective meaning of the law."[325] They represent the node in the chain of sanctions where law's imposition shifts from the theoretical to the physical. And as a result, they have the potential to pose perhaps the greatest menace to individual liberty, because they have the power to most literally curtail it.

For those reasons, federal-local law enforcement integration should draw particular attention from those concerned with federalism and liberty. As Justice Scalia put it in *Printz*, "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."[326] Justice Stevens, in dissent,

322. THE FEDERALIST NOS. 28, 180 (Alexander Hamilton).

323. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602 (2012); Bond v. United States, 131 S. Ct. 2355, 2364 (2011); Alden v. Maine, 527 U.S. 706, 758 (1999); Printz v. United States, 521 U.S. 898, 921–22 (1997); New York v. United States, 505 U.S. 144, 181 (1992); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (calling the protection of liberty "[p]erhaps the principal benefit of the federalist system"). There are plenty more examples, but they are unnecessary, and too numerous, to list.

324. Shelby County v. Holder, 133 S. Ct. 2612, 2623 (2013); Alden, 527 U.S. 706. Of course, the connection is clearer when the Court reverses criminal convictions for exceeding the enumerated powers. *E.g.*, Lopez v. United States, 514 U.S. 549 (1995); Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1075 (1995) ("The most obvious and direct way that power diffusion protects against the threat of federal tyranny is simply by placing legal limits on the scope of authority allowed the federal government."). *But see* Akhil Reed Amar, *Five Views of Federalism: Converse-1983 in Context*, 47 VAND. L. REV. 1229, 1239 (1994) (seeking a federalism-liberty nexus that is "crisper and more precise than the simple suggestion that diffusion of political power will generally prevent tyranny").

325. Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 700 (2011); *see also* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 57 (1988) (advocating stronger constitutional protection for local control of police, because of their "substantial discretion over what conduct constitutes a crime," "when to effect an arrest," and "how vigorously to enforce the law").

326. *Printz*, 521 U.S. at 922.

found that prospect ridiculous. The majority's "alarmist hypothetical," he wrote, "is no more persuasive than the likelihood that Congress would actually enact any such program."[327] And yet that is exactly what has happened with immigration enforcement. Since 2008, federal immigration agents have asked local police to arrest tens of thousands of people every month. This integration, though especially high-volume in immigration enforcement, has proliferated in other areas of policing too.[328]

Plenty of scholars have explored the post-9/11 ramp-up of local anti-terror policing.[329] Fewer have considered the prospect of a more quotidian integration. One exception is a recent article by Professor Rachel Harmon, which explores the ways federal funds obscure "the coercion costs of policing."[330] As she explains, those funds augment local police capabilities without accounting for consequent harms to individual liberty, property, and privacy.[331] They also weaken local political control by freeing law enforcement agencies from local budget pressures.[332] This analysis suggests that some of the same federal-state dynamics are at play in both immigration and criminal enforcement—most notably, downward pressure on state discretion. Even so, the inducement strategies that *threaten* the funds Harmon describes take things even further. Instead of simply freeing local police to expand their activities, these threats seek to directly control those activities.

Cooperative immigration enforcement thus shows one way that federal structure might safeguard liberty: by requiring the assent of a second government (and even a third, if you count the state and locality separately) before coercive action is taken against an individual. At the start of the federalism revival of the 1990s, Professor Akhil Amar speculated that the Court's renewed attention to the structure-liberty nexus might allow a more active role for the states in protecting individual rights against the federal government.[333] While the

327. *Id.* at 959 n.21 (Stevens, J., dissenting).

328. *See* K. JACK RILEY ET AL., STATE AND LOCAL INTELLIGENCE IN THE WAR ON TERRORISM (2005); Harris, *supra* note 54, at 9–12; Michael C. Waxman, *Police and National Security: American Local Law Enforcement and Counterterrorism After 9/11*, 3 J. NAT'L SEC. L. & POL'Y 377, 383–85 (2008) (describing the increased role of local police in preventing terrorism).

329. *See, e.g.*, Ann Althouse, *The Vigor of the Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231 (2004); Michael C. Waxman, *National Security Federalism in the Age of Terror*, 64 STAN. L. REV. 289 (2012).

330. Harmon, *supra* note 290. Professor Anil Kalhan has also noted the "liberty-enhancing potential of federalism" in the immigration context, where state and local governments might act as "moderating influences on the federal actors who seek their cooperation." Anil Kalhan, *Immigration Enforcement and Federalism After September 11, 2001*, *in* IMMIGRATION, INTEGRATION, AND SECURITY: AMERICA AND EUROPE IN COMPARATIVE PERSPECTIVE 181, 197–98 (Ariane Chebel d'Appollonia & Simon Reich eds., 2008).

331. Harmon, *supra* note 290, at 912–36.

332. *Id.* at 944.

333. Amar, *supra* note 324, at 1246–49.

states have not yet tried his particular proposal—a "converse-1983" statute to enforce state constitutional rights against federal officers[334]—integrated enforcement may give states an opportunity to hold up their end of the "double security" outside the courts.[335]

D. Accountability

Accountability, though a slippery concept, has long been extolled as one of federalism's main virtues. Smaller governments are more accountable to their citizens, goes the theory, because "local laws can be adapted to local conditions and local tastes,"[336] and because the "smaller scale of local government allows individuals to participate actively in governmental decisionmaking."[337] The Supreme Court invoked this value to justify the commandeering prohibition in *New York*, reasoning that federal mandates blurred the lines of accountability between citizens and their governments, both federal and state.[338] The Court's understanding of accountability was a fairly narrow one: "it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."[339] In other words, voters will not know whom to blame. The Court doubled down on this rationale in *Printz*[340] and stuck to its guns in *NFIB*.[341]

For as long as the accountability rationale has existed, commentators have maligned it. They have pointed out that preemption, conditional spending, and conditional non-preemption similarly blur lines of accountability.[342] They have also questioned whether commandeering actually diminishes the kind of accountability the Court has articulated; concerned voters can surely discern the source of unpopular policies, and commandeered officials (along with the media) will have every reason to communicate as much.[343] The voter confusion

334. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1512–17 (1987).

335. *See* Althouse, *supra* note 329 (also noting this possibility in the context of terrorism and national emergencies).

336. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493 (1987).

337. *See* Merritt, *supra* note 325, at 7–8; *see also* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

338. New York v. United States, 505 U.S. 144, 168–69 (1992).

339. *Id.* at 169; *see also* Printz v. United States, 521 U.S. 898, 930 (1997).

340. *Printz*, 521 U.S. at 929–30.

341. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2602–03 (2012).

342. *See* Caminker, *supra* note 324, at 1054–55; Jackson, *supra* note 208, at 2202; Siegel, *supra* note 208, at 1632.

343. *See* Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 B.U. L. REV. 1, 14 (2015); Siegel, *supra* note 208, at 1632–33.

hypothesis is, at best, an extremely speculative grounding for a major pillar of constitutional law—what if evidence emerged that voters were not confused?[344]

The practice of immigration enforcement has posed richer, more complex puzzles of accountability. In the actual interactions between federal and state actors, between state and local actors, and between local governments and their constituents, accountability has been a very real concern, just not exactly in the way the Court and its critics have imagined.

The most obvious example is the confusion over the legal meaning of detainers. As I explained in Section I.C, local governments and law enforcement officials spent years not knowing whether detainers were mandatory or not. They were abetted in this confusion by a combination of misleading language on the detainer form and silence from federal officials. Citing this uncertainty, many local officials rebuffed constituent pleas to adopt legally available policies. Some even hewed to the misunderstanding as a way of challenging state anti-detainer laws[345]—a position that, even if disingenuous, would have been far less tenable without the preceding years of confusion. Thus, the federal-local interaction has at times played out in a way that obscures, from both constituents *and* their governments, the nature of the policy choices available to them.

Another accountability issue is that, regardless of their reasons for participating, governments that help enforce immigration law may be punished by their residents' reluctance to engage with police and other arms of government. Some officials will of course find that cost worthwhile, but in that case, they will rightly be responsible for the tradeoffs of their chosen policy. Those officials who do not find it worthwhile will still face impediments to effective governance, regardless of whether voters know the source of the policy.

Confusion may seep in here as well: even a constituent who understands the source of, say, a notification mandate, might still wonder why the police are less effective in some neighborhoods; that kind of causal chain is not easy for anyone to observe. In this way, local officials are still the ones who "bear the brunt of public disapproval."[346] They also bear the brunt of private disapproval. When the federal government makes mistakes—as when it accidentally places a detainer on a U.S. citizen—the local government still gets sued.[347] That is an ac-

344. I find it much more likely that what animated the results in *New York* and *Printz* was far more basic: that a government whose institutions must follow the commands of another is not really a separate government. *See* Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("The federal balance is, in part, an end in itself, to ensure that States function as political entities in their own right."); Coan, *supra* note 343, at 18–27 (developing a "constituency-relations" rationale).

345. *See* Jose Gaspar, *Sheriff To Continue Immigration Holds Despite New Law*, BAKERSFIELDNOW.COM (Jan. 9, 2014), http://bakersfieldnow.com/news/local/sheriff-to-continue-immigration-holds-despite-new-law [http://perma.cc/7UK5-DZ42].

346. New York v. United States, 505 U.S. 144, 169 (1992).

347. *E.g.*, Galarza v. Szalczyk, 745 F.3d 634 (3d Cir. 2014); Miranda-Olivares v. Clackamas Cty., No. 3:12-cv-02317-ST, 2014 WL 1414305 (D. Or. Apr. 11, 2014); Morales v. Chadbourne, 996 F. Supp. 2d 19 (D.R.I. 2014).

countability mechanism as well, and it does not depend on voter confusion at all.

There are three lessons to draw from these observations. First, the blurred accountability hypothesis is sometimes true, and not just because voters are disengaged.[348] When the legal status of the interaction is itself blurry, local officials may themselves be uncertain about their options. Second, accountability is more textured than the simple story of constituents voting against officials they disagree with. Third, the Supreme Court's "process federalism" jurisprudence is in some ways incomplete; while it requires Congress to present options clearly,[349] there is no equivalent for the Executive Branch. We lack even a vocabulary, much less a doctrine, for evaluating those interactions. What are we to make of the legal uncertainty that cooperative enforcement is capable of producing? Should courts get involved? Should the potential for confusion inform what we think of downward pressure as an inducement strategy? In short, for federalism scholars, it may be too early to write off the importance of accountability. And for courts, the accountability questions lurking beneath the surface of enforcement federalism might be just beginning.

V. Ongoing Disuniformity?

If the federal government's inducement options are limited by the right of refusal in the ways I have suggested, one practical consequence is that many federal regulatory schemes, including immigration, will continue to be enforced in a geographically disparate way. In this final Part, I briefly consider what that result signals for the intertwined futures of immigration enforcement and cooperative federalism.

A. The Future of Immigration Enforcement

Over the last two decades, federal inducement has shifted between competing modes: negotiation and pressure; candor and secrecy. One of the biggest questions, for the next decade and beyond, is what the dominant mode of that interaction will be. Will there be open communication and modulation in response to local concerns? Or will there be cut-off threats, double negatives, and mandates? Will the choices faced by state and local governments be held out in the open, or will they exist behind the closed doors of bureaucratic haggle?

In choosing their approaches to inducement, DHS, the President, and Congress may face a certain trade-off between assistance and good will. Stronger methods may lead to more cooperation in the short run, but, as Professor Ming Chen has explained, subfederal officials' openness to participation is partly de-

348. *See, e.g.*, Siegel, *supra* note 208, at 1632 ("[I]t seems likely that citizens who pay attention to public affairs and who care to inquire will be able to discern which level of government is responsible for a government regulation, and citizens who do not care to inquire may be largely beyond judicial or political help on the accountability front.").

349. *See supra* notes 161–63 and accompanying text.

termined by the perceived legitimacy of federal action.[350] If those officials feel disrespected—regardless of their substantive or even procedural policy views—they may be more inclined to exercise whatever refusal rights they have.

Let us imagine that the President and DHS wanted to mollify as many local concerns as possible. Which ones could they address? Certainly most of the substantive ones. DAPA and the Priority Enforcement Program, for instance, represent promises to change the distribution, and perhaps the intensity, of enforcement policy in line with some state and local preferences. Federal actors could also address the procedural objections associated with financial cost, by reimbursing detention costs or indemnifying litigation expenses. But they probably cannot fully address the community policing concern, which has been widespread and consistent through multiple phases of inducement and resistance.[351] Nor are they likely to assuage the full range of substantive objections, which would involve a significant scaling back of interior enforcement, something many states and localities would oppose. Because of these widely varying local preferences, ongoing tension—and ongoing variation—is certain to persist.

How should the federal government react to this disuniformity? First of all, there are already some signs it is modulating its behavior geographically. In fiscal year 2013, Criminal Alien Program removals, as a percentage of the noncitizen population, varied significantly by state, and along lines that roughly track immigration politics.[352] The use of detainers has similarly varied significantly across states.[353] For instance, from 2012 to mid-2013, while detainer use dropped nationally, it dropped by much more in California (thirty-one percent) than Texas (ten percent).[354] Much more empirical work remains to under-

350. Ming H. Chen, *Trust in Immigration Enforcement: State Noncooperation and Sanctuary Cities After Secure Communities*, 91 CHI.-KENT L. REV. 13 (2015) (developing an account of non-cooperation based on perceptions of federal action's legitimacy).

351. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 81–82 (2014) (describing the "typical rationale" during multiple iterations being "to let unauthorized migrants seek help from police and other city employees without worrying about immigration enforcement"); Harris, *supra* note 54 (describing this objection in the post-9/11 years).

352. Cantor et al., *supra* note 83, at 20–22. States with the highest percentages include Texas, Arizona, Mississippi, Kentucky, and Nebraska. States with the lowest percentages include Massachusetts, New York, Maryland, Connecticut, and Illinois. *Id.* This does not reflect anti-detainer policies, because the data largely predate the recent wave of resistance.

353. *See Targeting of ICE Detainers Varies Widely by State and by Facility*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Feb. 11, 2014), http://trac.syr.edu/immigration/reports/343/ [http://perma.cc/F3RW-E2XT].

354. *Surprising Variability in Detainer Trends by Gender, Nationality*, TRANSACTIONAL RECS. ACCESS CLEARINGHOUSE (Jan. 22, 2014), http://trac.syr.edu/immigration/reports/340/ [http://perma.cc/P6U4-533L]. Note that this occurred *before* the TRUST Act.

stand federal enforcement practices, but these data suggest some real geographic variation along political lines. If true, this would be a prime example of the "executive federalism" explored by Professor Jessica Bulman-Pozen in a recent article.[355]

Immigration scholars have long debated the merits of disuniformity.[356] The case against it often starts with the word "uniform" in the Naturalization Clause.[357] But that one word says little about the wisdom of any enforcement policy. Other uniformity advocates have pointed to spillovers. It is true that pro-enforcement laws like Arizona's S.B. 1070[358] might shift immigration populations elsewhere.[359] But anti-cooperation laws are much less likely to impact other jurisdictions. Those that limit enforcement are, if anything, likely to attract immigrants from places that favor tighter enforcement—exactly what the latter places might want. Nor do anti-enforcement policies raise acute foreign policy concerns, which typically stem from subfederal governments being too exclusionary, not too welcoming.[360] Finally, in the related sphere of integrating new immigrants, we have always had great variation.[361] Disuniformity, in this context, might actually be a healthier way to negotiate some deep national conflicts, a way to promote the federalism values of experimentation and preference-matching through variable *federal* action.

The coming years are likely to see large shifts in federal enforcement policy. They may also witness major changes in the statutory regime governing immi-

355. Bulman-Pozen, *supra* note 19 (arguing that, due to bureaucratic integration and partisan gridlock, the Executive Branch is modulating its policy across states with respect to healthcare, marijuana, education, and climate change).

356. *Compare* Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Law Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965 (2004) (con), *with* Peter J. Spiro, *Learning To Live with Immigration Federalism*, 29 CONN. L. REV. 1627 (1997) (pro).

357. U.S. CONST. art. I, § 8, cl. 4 (granting Congress power to "establish an uniform Rule of Naturalization").

358. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

359. *See* Hiroshi Motomura, *Immigration and Alienage, Federalism and Proposition 187*, 35 VA. J. INT'L L. 201, 215 (1994) ("If [Proposition 187] works as intended and reduces the undocumented population in California, it will likely do so as much by shifting the undocumented population to other states as by deterring its entry into the United States as a whole."). For an argument that spillovers, even negative ones, carry a number of benefits for the national polity, see Heather K. Gerken & Ari Holzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57 (2014).

360. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 63–64 (1941); Chy Lung v. Freeman, 92 U.S. 275, 279–80 (1875).

361. Rodríguez, *supra* note 33.

gration. During this period and beyond, the rules of inducement will set important boundaries for the structure of immigration law.[362]

B. The Future of Cooperative Federalism

Much work remains in fleshing out the Tenth Amendment rules of engagement. Some questions are obvious; for instance, we do not yet know at what point "pressure turns into compulsion."[363] Others are less apparent on the face of the cases, but still urgent, because their potential applications are pervasive. How does the coercion ban apply to local governments? What kinds of conditional non-preemption violate the right of refusal? Does that right tolerate federal efforts to restructure intra-state authority?

The answers will matter far beyond immigration. Countless federal regulatory areas involve cooperative enforcement, from marijuana,[364] to tax,[365] to healthcare,[366] to national security.[367] Like immigration, these areas involve difficult questions of institutional design, both across the federal-state divide and within the state. The set of available inducement options in these areas will exert a profound influence on the depth of integration for decades to come.

These vertical dynamics also open up intriguing separation-of-powers questions. For instance, there has been a marked difference in the nature of inducement used by Congress and by administrative agencies: legislative inducement has been a brighter line, while executive inducement has been more uncertain, informal, and opaque. If it wanted, Congress could impose some federalism-protective procedural requirements on the Fourth Branch, similar to those in the Administrative Procedure Act.[368] So could the President. Like the APA's mandates of transparency and explanation, an "Administrative Federalism Act" might require agencies to publicize and explain the nature of the choices offered; it might also say something about which state institutions should get input over program participation. Professor Abbe Gluck has recently pointed out that we still have no judicial doctrine to tell us "whether state implementers of federal law receive . . . any 'process' when it comes to their inter-

362. *See* Eric A. Posner, *The Institutional Structure of Immigration Law*, 80 U. CHI. L. REV. 289, 290 (2013) (calling on immigration scholars to pay closer attention to questions of institutional structure).

363. Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2659 (2012) (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

364. *See* Schwartz, *supra* note 3.

365. *See* Mikos, *supra* note 229, at 156.

366. *See* Fahey, *supra* note 2; Gluck, *supra* note 313.

367. *See* Waxman, *supra* note 329.

368. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 500 *et seq.* (2012)). For an argument that non-transparency in administrative federalism might be a good thing, see Bulman-Pozen, *supra* note 19, at 1006–09.

actions with federal agencies."[369] The political branches could answer that question too.

Finally, this study points to a number of questions for localism and the intrastate separation of powers. Most prominently, the federal practice of dissecting, disaggregating, and devolving state authority merits close attention. Federalism scholars have only begun to scratch the surface. In a world of increasingly strategic federalism, federal power to restructure state governance will have a serious impact on local politics and governance. As my case study suggests, the allocation of authority can shape a number of substantive regulatory choices.[370] Future work on cooperative federalism will need to account for both the state *and* local separation of powers.

Conclusion

Cooperative federalism and immigration enforcement are evolving in deeply intertwined ways. Because federal efforts rely so much on local aid, they have spawned a host of inducement approaches. They include lures and bluffs, lectures and meeds, gifts and commands. These approaches shed new light on federalism theory, because they provide a dense body of experience through which to test some of the predictive and normative claims in the federalism literature. They also illuminate federalism doctrine by providing a series of concrete case studies with which to probe recent jurisprudence. And they may show up—in many cases, they already have—in a host of policy arenas beyond immigration.

The right of refusal is a doctrinal tool to navigate these interactions. As Part II explained, the right of refusal is a state's right to withhold its regulatory services. It cuts through the Supreme Court's commandeering, coercion, and clear notice cases, whose common concern is that states and localities, if they object to federal policy, must be free to withhold their regulatory services. This leaves the vast majority of inducement strategies on the table. But it casts considerable doubt on the more forceful ones in immigration law.

The right of refusal also suggests a certain kind of decorum for American federalism. In many ways, states are not full sovereigns. They cannot defend themselves, or conduct foreign policy, or directly regulate migration. The federal government can evict them from a whole host of policy areas when it wants to. The right of refusal alters this dynamic slightly. It ensures that big federal programs proceed with a certain amount of local consent, and that the federal

369. Gluck, *supra* note 19, at 2001.

370. There are many other examples I have not explored in this Article. One is the mismatch between city police chiefs, who control most urban policing, and county sheriffs, usually elected, who run the jails and thus make the more consequential decisions about immigration enforcement. Another is the conflict, in many places, between county legislatures and sheriffs; the former tend to prefer less immigration enforcement, the latter more. *See, e.g.*, Angela Woodall, *Alameda County Sheriff Asked To Stop Detaining Immigrants Under Federal Program*, MERCURY NEWS (Apr. 19, 2013), http://www.mercurynews.com/2013/04/19/alameda-county sheriff-asked-to-stop-detaining-immigrants-under-federal-program/ [http://perma.cc/5XDQ-T7HM].

government treats state and local officials as grown-up partners, even when they disagree. By restricting the parameters of permissible inducement, it ensures a certain kind of dialogue.

Finally, the right of refusal sets an agenda for further thought. Scholars, courts, mayors, sheriffs, immigrants, and citizens—all have a giant stake in two major questions. How transparent is federal-state collaboration going forward? And how much can federal policy vary state by state? The answers will decide not just what kind of immigration system we have over the coming decades, but also how viable states, counties, and cities will be as independent sites of politics in the twenty-first century.